(25)

No. 89-333-CFX
Status: GRANTED

Title: California, Petitioner
v.
Federal Energy Regulatory Commission, et al.

Docketed:
August 26, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Walston,Roderick E.

Counsel for respondent: Solicitor General, Touton,Louis

Entry	Date	Note	Proceedings and Orders
1	Aug 26 1989	G	Petition for writ of certiorari filed.
3	Oct 3 1989		Order extending time to file response to petition until November 6, 1989.
4	Oct 6 1989		Brief amici curiae of American Rivers, et al. filed.
6	Oct 6 1989		Brief amicus curiae of American Public Power Association filed.
5	Nov 3 1989		Brief amici curiae of Modesto Irrigation District, et al. filed.
7	Nov 6 1989		Brief of respondent FERC in opposition filed.
8	Nov 6 1989		Brief amicus curiae of Edison Electric Institute filed.
9	Nov 6 1989		Brief of respondent Rock Creek Limited Partnership in opposition filed.
11	Nov 6 1989		Brief amici curiae of Idaho, et al. filed.
10	Nov 8 1989		DISTRIBUTED. November 22, 1989
12	Nov 17 1989	X	Reply brief of petitioner CA filed.
14	Nov 27 1989		REDISTRIBUTED. December 1, 1989
15	Dec 4 1989		Petition GRANTED.
			**********
16	Jan 5 1990		Joint appendix filed.
17	Jan 11 1990		Brief of petitioner California filed.
18	Jan 11 1990		Brief amici curiae of County of Inyo, Bishop Creek Water Assn., et al. filed.
19	Jan 12 1990		Brief amici curiae of Idaho, et al. filed.
20	Jan 17 1990		Brief amici curiae of Council of State Governments, et al. filed.
21	Jan 17 1990		Brief amici curiae of American Rivers, et al. filed.
22	Jan 23 1990		Administrative record received.
27	Jan 25 1990	D	Motion of respondent Rock Creek Limited Partnership for divided argument filed.
23	Jan 26 1990		SET FOR ARGUMENT TUESDAY, MARCH 20, 1990. (3RD CASE)
24	Jan 30 1990		Record filed.
		*	Certified copy of C.A. Proceedings received.
25	Feb 8 1990		Brief amicus curiae of Klamath Falls, Oregon filed.
26	Feb 12 1990		Brief of respondent Rock Creek Limited Partnership filed.
28	Feb 12 1990		Brief amici curiae of Pacific Gas and Electric, et al. filed.
29	Feb 12 1990		Brief amici curiae of Modesto Irrigation District, et al. filed.
30	Feb 12 1990		Brief of respondent FERC filed.
31	Feb 12 1990		Brief amici curiae of Edison Electric Institute, et al. filed.
32	Feb 12 1990		Brief amicus curiae of Pacific Northwest Utilities filed.

No. 89-333-CFX

Entry	Date	Note	Proceedings and Orders
34	Feb 15 1990		CIRCULATED.
33	Feb 20 1990		Motion of respondent Rock Creek Limited Partnership fo: divided argument DENIED.
35	Mar 1 1990	X	Reply brief of petitioner California filed.
36	Mar 20 1990		ARGUED.

89-333

No.

Supreme Court, U.S.
FILED
AUG 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Power Act preempts state regulatory water rights laws otherwise applicable to hydropower projects licensed by the Federal Energy Regulatory Commission, or instead whether section 27 of the Act—which subjects such projects to state laws relating to the "control, appropriation, use, or distribution" of water—precludes such preemption.

PARTIES

The petitioner is the State of California, acting on behalf of the State Water Resources Control Board.

The respondents are the Federal Energy Regulatory Commission and the Rock Creek Limited Partnership.

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No.

In the Supreme Court
of the
United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Ninth Circuit (App. 1-13) is reported at 877 F.2d 743. The Order in Response to Request for Declaratory Order and Providing for Hearing, Federal Energy Regulatory Commission (App. 14-22), is reported at 38 FERC ¶ 61,240 (March 1987). The Order Denying Rehearing, Federal Energy Regulatory Commission (App. 23-36), is reported at 41 FERC ¶ 61,198 (November 1987).

JURISDICTION

The decision of the U.S. Court of Appeals for the Ninth Circuit was filed and entered on June 6, 1989. No petition for

rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

Section 27, Federal Power Act:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.).

STATEMENT OF THE CASE

1. Nature of the Controversy

The Rock Creek Limited Partnership ("partnership") operates a hydropower project on Rock Creek, a tributary of the South Fork of the American River near Placerville, California. App. 2, 14. The project diverts water from a dam located on Rock Creek to a power plant for generation of hydroelectric power; the water is returned to the South Fork of the American River about one mile below the original diversion point. App. 2-3, 14. The project diverts some water for the project and allows the remainder to flow in its natural course in Rock Creek. The minimum amount of water flow that must be left in Rock Creek is denominated the "flow rate."

In June 1982, the partnership applied to the Federal Energy Regulatory Commission ("FERC") for a license to build and operate the Rock Creek project. App. 3, 14. In April 1983, FERC issued the license. *Id.* In accordance with the partnership's recommendations, the license established interim flow rates of 11 cubic feet per second (cfs) from May through September, and 15 cfs from October through April. *Id.* The license requires the partnership, in conjunction with the California Department of Fish and Game ("CDFG"), to conduct further instream studies to enable FERC to establish permanent flow rates for the project. App. 3, 15.

In May 1980, the partnership applied to the State Water Resources Control Board ("State Board") for permits to appropriate water for the project, and in June 1982 filed an amended application. App. 3, 16. After lengthy hearings, the State Board in February 1984 issued Decision 1596, approving issuance of the permits. *Id.* The State Board, although adopting the interim flow rates recommended by the partnership, found that the partnership's instream flow study was "deficient." Decision 1596, State Water Resources Control Board, at 8-9 (EOR 37). Accordingly, the State Board required the partnership, in conjunction with CDFG, to conduct a new instream study to enable the Board to establish permanent flow rates for the project. App. 3, 16. The State Board reserved jurisdiction to establish permanent flow rates after the partnership's instream study was completed. *Id.* The State Board found that minimum flows were necessary in order to protect an important trout resource in the Rock Creek-American River system. *Id.*

After completion of the new instream study, the State Board conducted a hearing to establish permanent flow rates for the project. Based on its findings, the State Board on March 19, 1987, established permanent flow rates of 60 cfs from March through June and 30 cfs from July through February. App. 4, 17. The State Board in large part adopted CDFG's recommended flow rates and rejected the partnership's recommended rates. The State Board found that CDFG's recommended rates would adequately protect the trout resource in the Rock Creek-American River system, and that the partnership's recommended rates would not. *Id.*

2. Proceedings Below

In July 1986, during the pendency of the State Board hearing to establish permanent flow rates, the partnership petitioned FERC for an order declaring that FERC has exclusive jurisdiction to establish flow rates for the project, and that the partnership need not comply with the State Board's flow rates. App. 4, 17. On March 11, 1987, FERC issued an order declaring that "the establishment of minimum flows is a matter beyond the reach of state regulation;" that the State Board "has no authority to set minimum flows for the project that conflict with those contained

in the license;" and that the project "must comply with the flow requirements . . . of its license until otherwise ordered by the Commission, irrespective of any action taken by" the State Board. App. 17-18.

On April 10, 1987, the State of California, on behalf of the State Board, filed with FERC a motion for intervention and request for rehearing. App. 4, 24. California's rehearing request argued that the State Board has water rights authority to establish flow rates under section 27 of the Federal Power Act. *Id.* FERC granted the intervention motion but denied the rehearing request. App. 4, 36. In denying the rehearing request, FERC declared that "the establishment of minimum flows for fishery protection or other purposes at licensed projects is a matter beyond the reach of state regulation and is within the Commission's exclusive jurisdiction." App. 23. Under 16 U.S.C. § 825*l*, California filed a petition in the U.S. Court of Appeals for the Ninth Circuit for review of FERC's declaratory order and order denying rehearing. App. 4.

On June 6, 1989, the Ninth Circuit issued an opinion affirming FERC's declaratory order and order denying rehearing. App. 1-13. The court held that the Federal Power Act preempts state regulatory water rights laws applicable to FERC-licensed hydropower projects. *Id.* The court concluded that FERC has exclusive jurisdiction to establish flow rates for the Rock Creek project, and that the partnership need not comply with the flow rates mandated by the State Board. *Id.* The court stated that its preemption analysis was supported by this Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), and also by FERC's "comprehensive planning authority" over hydropower projects under the Federal Power Act. App. 7-12. The court rejected California's argument that section 27 authorizes state water rights regulation of hydropower projects, stating that section 27 merely protects private "proprietary rights." App. 11. Quoting from this Court's decision in *First Iowa*, the Ninth Circuit stated that:

> " 'The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. *It therefore has primary, if not exclusive, reference to such proprietary rights. . . .*' " App. 11, quoting from 328 U.S. at 175-176 (emphasis added in Ninth Circuit opinion).

The Ninth Circuit concluded that:

> "This reading of section 27 and the FPA as a whole teaches that Congress intended federal law to preempt state regulation in all aspects of hydropower projects save for the limited proprietary exceptions specified in the section." App. 11.

Therefore, the Ninth Circuit held that section 27 does not authorize state regulation of hydropower water uses, including flow rates.

ARGUMENT

INTRODUCTION

This case raises a significant national question that this Court has never directly decided, and concerning which this Court's most relevant decisions are in conflict. The question is whether the Federal Power Act (FPA) preempts state regulatory water laws applicable to hydropower projects licensed by the Federal Energy Regulatory Commission (FERC), or instead whether section 27 of the FPA precludes such preemption. Section 27 provides that federally-licensed hydropower projects must comply with state laws relating to "control, appropriation, use, or distribution" of water.

In petitioner's view, this Court should grant the petition and review this question for four reasons. First, this Court's most relevant decisions are in conflict with respect to the question. In *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), this Court stated, in dictum, that section 27 protects only private "proprietary rights" and does not authorize state regulation of hydropower water uses. Section 27 contains virtually identical language to section 8 of the Reclamation Act of 1902, and indeed was modeled after the latter provision. *In California v. United States*, 438 U.S. 645 (1978), this Court held that section 8 of the 1902 Act authorizes state *regulation* of

federal water uses and is *not* limited to "proprietary rights." In short, *California*, in construing section 8, rejected the same "proprietary rights" argument that *First Iowa* upheld in construing section 27. Since section 27 was modeled after section 8, there is no basis for construing these provisions differently. This Court should grant review to resolve the conflict between its decisions in *California* and *First Iowa*.

Second, the Ninth Circuit decision, in holding that the FPA preempts state water laws, misconceives the broad language and policy of section 27. In enacting section 27, Congress meant to preserve the states' traditional water rights authority over hydropower projects. Congress has traditionally deferred to state water laws, and Congress continued this traditional policy in enacting section 27. In exercising their water rights authority, the states make important policy judgments concerning allocation of water among competing public and private needs, allocations that vitally affect the states' economic and environmental interests.

Third, the Ninth Circuit decision precludes uniform state regulation of water rights in the same river, thus resulting in potentially inconsistent regulation of such rights. In effect, the decision creates separate bodies of federal law and state law in the same river, resulting in confusion and uncertainty.

Fourth, there is no actual conflict between state and federal flow requirements in this case, because the state requirements are more stringent than the FERC requirements. The project, in complying with the more stringent state requirements, will necessarily comply with the less stringent FERC requirements as well.

In summary, this case presents a significant and unresolved national question concerning the scope of state water rights authority over federally-licensed projects, a question to which this Court's decisions provide conflicting answers. This Court should grant the petition to resolve the conflict and reaffirm the states' traditional water rights authority, as such authority was recognized by Congress in enacting the FPA.[1]

---

[1] The preemption issue raised in this case has not previously arisen, at least in California, because hydropower projects have consistently complied with state water rights laws rather than relied on the argument that the FPA preempts such laws. According to the State Board's information, 492 non-federal hydropower projects in California have acquired or have applied for water rights under California law, and, again according to the State Board's information, no hydropower project has diverted water without acquiring or at least claiming a water right under California law. The Ninth Circuit decision, in holding that state water laws are preempted, effectively changes the *status quo* by allowing hydropower projects to bypass state water rights laws with which they have consistently complied.

The preemption issue, although somewhat dormant for several years beause of limited hydropower development, has gained immediacy since 1978, when Congress enacted the Public Utilities Regulatory Policies Act (PURPA), 92 Stat. 3117 (1978), codified as amended, 16 U.S.C. §§ 15. 16, 30, 42, 42. PURPA has caused a dramatic increase in applications for FERC licenses by creating substantial financial incentives for hydropower development. M. Whittaker, *Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities*, 10 HARV. ENV. L. REV. 135, 138-141 (1986). For example, only 47 pre-PURPA applications for FERC permits and licenses were filed in 1977, but 1,752 post-PURPA applications were filed in 1981. *Id.* at 140. As the number of applications for FERC licenses has greatly increased, the potential conflict between FERC regulation and state water rights regulation has also increased.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN ITS DECISIONS IN *CALIFORNIA* AND *FIRST IOWA*

A. Conflict Between *California* and *First Iowa*

Section 27 of the FPA provides that hydropower projects licensed by FERC are subject to state laws relating to the "*control, appropriation, use, or distribution* of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.) (emphasis added). Section 27 was patterned after section 8 of the Reclamation Act of 1902, which provides that federal reclamation projects authorized under that Act are subject to state laws relating to "*control, appropriation, use, or distribution* of water used in irrigation, or any vested right acquired thereunder." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1982 ed.)

(emphasis added.) The legislative history of section 27 indicates that the provision was directly modeled after section 8.[2] Indeed, the Ninth Circuit below acknowledged that sections 8 and 27 contain "virtually identical" language and that section 8 "apparently served as a drafting model for section 27." App. 9, 10.

In *California v. United States*, 438 U.S. 645 (1978), this Court held that section 8 of the 1902 Reclamation Act requires federal agencies to comply with state water rights laws to the extent that state laws are not inconsistent with "clear congressional directives." 438 U.S. 645, & 672 n. 25. In that case, the State Board issued permits authorizing the Secretary of the Interior to appropriate water for the federal New Melones Dam in California. The permits contained several major conditions, some of which required water releases for protection of downstream fish resources. This Court, reversing the Ninth Circuit, upheld the State Board's right to impose the conditions. The Court held that section 8 requires the Secretary both to acquire water rights under state law and to comply with conditions attached to the rights. *Id.* at 675. The Court noted that Congress has traditionally deferred to state water rights laws, stating that:

> "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the *consistent thread of purposeful and continued deference to state water law by Congress.*" *Id.* at 653 (emphasis added).

The Court specifically rejected the United States' argument that section 8 is limited to "proprietary rights." *Id.* at 672-674, & n. 24. The Court stated that the Secretary must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law," and must comply with state law in providing "distribution to individual landowners" once the water is released

[2] For example, the author of section 27 stated during the congressional debates that:

> "I took this language of section 14 [the predecessor of section 27] from section 8 of the reclamation act and inserted it in the bill." 51 Cong. Rec. 14067 (1914) (remarks of Rep. Taylor).

from the dam. *Id.* at 665, 667. The Court stated that "legal confusion . . . would arise if federal water law and state water law reigned side by side in the same locality." *Id.* at 668-669.[3]

Since *California* holds that section 8 requires the Secretary to comply with state water laws in operating federal reclamation projects, and since section 27 of the FPA was modeled after section 8, section 27 similarly requires hydropower projects licensed under the FPA to comply with state water laws. Moreover, since section 8 requires the Secretary to comply with conditions attached to state water rights permits, section 27 requires hydropower projects also to comply with conditions attached to state water rights permits. In short, section 27 imposes the same obligations on hydropower projects that section 8 imposes on federal reclamation projects. This construction is the clear import of *California*.

The Ninth Circuit disagreed, relying on dictum in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), which was decided thirty-two years before *California*. App. 10. In *First Iowa*, a hydropower project applied to FERC[4] for a license to build and operate a project on a river in Iowa. FERC denied the license on grounds that the project had failed to acquire a use permit under Iowa law. The denial was based on section 9(b) of the FPA, which requires hydropower projects to submit "satisfactory evidence" of compliance with state law as a condition to acquiring a FERC license. 16 U.S.C. § 802(b). This Court overturned FERC's order, stating that section 9(b) is an "informational" provision only. 328 U.S. at 169, 177. According to the Court, section 9(b) merely requires hydropower projects to submit "evidence" of steps taken to

[3] On remand, the Ninth Circuit, in a decision authored by then-Judge Kennedy, upheld all conditions imposed by the State Board on the New Melones Project, concluding that none were inconsistent with "clear congressional directives." *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

[4] The application was to FERC's predecessor, the Federal Power Commission. For simplicity, the Federal Power Commission will be referred to as FERC.

comply with state law prior to applying for a FERC license, but does not require projects actually to acquire a state permit as a "condition precedent or administrative remedy that must be exhausted before securing a federal license." *Id.* at 170. Otherwise, the Court stated, hydropower development would be subject to a "dual system of control" that would be "unworkable." *Id.* at 164, 168.

The *First Iowa* Court went beyond its immediate holdings—which was limited to the "informational" effect of section 9(b) in proceedings before FERC—to comment on the effect of section 27. The Court stated that:

> "Section 27 expressly 'saves' certain state laws relating to *property rights* as to the use of water, so that these are not superseded by the terms of the Federal Power Act. . . . [¶] The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such *proprietary rights*." *Id.* at 175-176 (emphasis added).

Thus, the *First Iowa* dictum states that section 27 is limited to "proprietary" rights and does not authorize state *regulation* of hydropower water uses. The Ninth Circuit relied on this dictum in construing section 27 here. App. 11.

The *First Iowa* Court—in stating that section 27 is limited to "proprietary rights"—expressly followed the precedent that, in the Court's view, had been established by section 8 of the 1902 Reclamation Act. 328 U.S. at 176 n. 20. The *First Iowa* Court noted that section 27 is "similar" to section 8 in that both require compliance with state laws relating to "control, appropriation, use, or distribution" of water. *Id.* The Court then stated that:

> "The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to *proprietary rights* under the reclamation law and in public lands, *carries that established meaning of the language [of section 8] into the Federal Power Act* in the absence of anything in the Act calling for a different interpretation of the language." *Id.* (emphasis added).

Thus, the *First Iowa* Court stated that section 27 "carries" the meaning of section 8 "into" the FPA, and that—since section 8 is limited to "proprietary rights"—section 27 is similarly limited. In short, the *First Iowa* Court—unlike the Ninth Circuit below—took the view that section 27 has the *same* meaning as section 8, although the Court ascribed to section 8 a different meaning than in its more recent decision in *California*.

The *First Iowa* view that section 8—and hence section 27—is limited to "proprietary rights" was consistent with this Court's contemporaneous interpretation of section 8 in the 1950's and 1960's. In several contemporaneous decisions, this Court stated in dicta that section 8 is limited to "proprietary rights" and therefore does not authorize state regulation of federal water uses under the 1902 Reclamation Act. *Ivanhoe Irrigation Dist. v. MacCracken*, 357 U.S. 275, 292 (1958); *City of Fresno v. California*, 372 U.S. 627, 630 (1963). In *Ivanhoe*, the Court stated that section 8 does not "compel the United States to deliver water on conditions imposed by the State." 357 U.S. at 292. In *City of Fresno*, the Court stated that section 8 does not prevent the United States from seizing private water rights, and simply "leaves to state law the definition of property interests . . . for which compensation must be paid" when the United States seizes such rights. 372 U.S. at 630. Thus, in *Ivanhoe* and *City of Fresno*, this Court adopted the view—consistently with its earlier dictum in *First Iowa*—that section 8 is limited to "proprietary rights" and does not authorize state regulation of water use.

In *California v. United States*, however, this Court expressly "disavow[ed]" the earlier dicta in *Ivanhoe* and *City of Fresno* that section 8 is limited to "proprietary rights," and expressly held that the provision authorizes state regulation of water uses. 438 U.S. at 672-674, & n. 24. In disavowing the *Ivanhoe* and *City of Fresno* dicta, the *California* Court stated that section 8 "does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.' " 438 U.S. at 675. Referring to the United States' "proprietary rights" argument, the

Court stated that "[t]he Government's interpretation would trivialize the broad language and purpose of § 8." *Id.* at 675.

Since *California* disavowed the dicta in *Ivanhoe* and *City of Fresno* restricting the scope of section 8, the *First Iowa* dictum restricting the scope of section 27 is no longer valid. That is, since *California* held that section 8 authorizes state regulation of water use and is not limited to "proprietary rights," and since *First Iowa* stated that section 27 "carries" the meaning of section 8 "into" the FPA, *California* and *First Iowa*, read conjunctively, stand for the view that section 27 also authorizes state regulation of water use and is not limited to "proprietary rights." In short, *California* rejected the premise on which *First Iowa*'s interpretation of section 27 was based.

B. Ninth Circuit Analysis

In a brief and unembellished passage, the Ninth Circuit decision stated that *California* and *First Iowa* can be reconciled because they "address two different and entirely separate water use programs." App. 12. The Ninth Circuit decision does not spell out the differences between these programs, or indicate why any such differences support incongruent interpretations of sections 8 and 27. Indeed, the decision fails to mention that *First Iowa* itself construed these sections congruently by stating that section 27 "carries that established meaning of the language [of section 8] into the Federal Power Act." 328 U.S. at 177 n. 20.

To be sure, the Federal Power Act and the Reclamation Act establish different programs in that FERC exercises a regulatory function and the Secretary of the Interior—who administers the federal reclamation program—primarily exercises an operational function. On the other hand, the Federal Power Act and Reclamation Act commonly provide for federal *development* of water for specified economic purposes; commonly establish federal agencies that are responsible for providing such development; and commonly utilize a resource—water—that the states have traditionally regulated and controlled. Moreover, Congress has narrowed any differences between the programs by providing for extensive regulation of federal reclamation projects. See, *e.g.*, National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.*; Reclamation Project Act of 1939, 43 U.S.C. § 485h; Reclamation

Reform Act of 1982, 96 Stat. 1263; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c. The Secretary of the Interior has narrowed the differences further by preparing feasibility and engineering reports that provide *de facto* regulation of reclamation projects. See, *e.g.*, H.R. Doc. No. 453, 87th Cong., 2d Sess. (1962) (feasibility report for New Melones Project). For these reasons, the similarities of the Reclamation Act and Federal Power Act are stronger than their differences, and there is no basis for construing the savings provisions in sections 8 and 27 differently.

By construing the savings provisions differently, the Ninth Circuit decision results in inconsistent water rights regulation in the reclamation and hydropower contexts. Under the decision, state water rights laws apply to federal reclamation projects but not to private hydropower projects. For example, California law applies to a federal reclamation project in the Stanislaus River—as this Court held in *California*—but, under the Ninth Circuit's analysis, not to a private hydropower project located in the same river. This result creates the "legal confusion" that, as this Court noted in *California* "would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 668-669.

Indeed, there is a stronger basis for applying state laws in the hydropower context involved here than in the reclamation context involved in *California*. Federal reclamation projects are built and operated by the federal government, and are authorized and funded by Congress. Private hydropower projects, on the other hand, are built and operated for profit purposes by private entities, and are *not* authorized or funded by Congress. Moreover, federal reclamation projects serve important national and regional purposes, and, conversely, private hydropower projects serve more local purposes. As the Ninth Circuit stated in a FERC case involving the navigation servitude:

> "[T]he position of a licensee [under the FPA] is distinguishable from that of the United States with respect to furthering the national interest. By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the national interest

on a national scale; the licensee often on a local scale, on projects thought to be of insufficient dimensions to warrant the assertion of national power." *Public Utility Dist. No. 1 v. Seattle,* 382 F.2d 666, 669-670 (9th Cir. 1967).

If Congress defers to state laws applicable to federal projects that are authorized and funded by Congress and that serve important national purposes, *a fortiori,* Congress defers to state laws applicable to private hydropower projects that are not authorized or funded by Congress and that serve essentially local purposes.

C. Summary

To summarize, this Court in *California* held that section 8 authorizes state regulation of federal water uses, rejecting the argument that the provision is limited to "proprietary rights." More than thirty years earlier, this Court in *First Iowa* stated in dictum that section 27 is limited to "proprietary rights" and does not authorize state regulation of hydropower water uses. The *California* Court, in construing section 8, rejected the same "proprietary rights" argument that the *First Iowa* Court upheld in construing section 27. There is no basis for construing the provisions incongruently, because section 27 was modeled after section 8. Indeed, the *First Iowa* Court stated that section 27 should be read congruently with section 8, although this Court held a different view of section 8 at the time. In *California*, this Court flatly rejected its earlier view that section 8 is limited to "proprietary rights," thus rejecting the premise on which *First Iowa's* interpretation of section 27 was based. The time has come for this Court to complete the circle and hold—consistently with its recent decision in *California*—that section 27 authorizes state regulation of hydropower water uses and is not limited to "proprietary rights."[5]

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[5] In petitioner California's view, *First Iowa* can be reconciled with *California* and distinguished here. In *First Iowa*, the Court held only that section 9(b) does not require hydropower projects to acquire state water rights as a condition precedent to acquiring a FERC license. This case, on the other hand, raises the question whether section 27—as opposed to section 9(b)—requires hydropower projects to acquire state water rights prior to diverting water, rather than prior to acquiring a FERC license. Conceivably, section 9(b) can be interpreted—as in *First Iowa*—to hold that hydropower projects need not acquire state water rights as a condition precedent to acquiring a FERC license, even though section 27 should be interpreted—as here—to hold that such projects must acquire state water rights prior to diverting water. The Ninth Circuit did not accept this suggested distinction.

II. IN HOLDING THAT THE FEDERAL POWER ACT PREEMPTS STATE WATER LAWS, THE NINTH CIRCUIT DECISION MISCONSTRUES THE BROAD LANGUAGE AND PURPOSE OF SECTION 27, WHICH AUTHORIZES THE STATES TO EXERCISE TRADITIONAL WATER RIGHTS AUTHORITY OVER HYDROPOWER PROJECTS

A. Anti-Preemptive Effect of Section 27

Section 27 of the FPA is an anti-preemption provision, for it specifically limits the preemptive effect of the FPA. According to its terms, section 27 precludes preemption of state laws relating to the "control, appropriation, use, or distribution" of water. No exception is made for state laws applicable to hydropower projects. Indeed, the provision defines the obligations of hydropower projects under state law. Nothing in the provision precludes state "regulation" of water or limits its scope to "proprietary rights." State flow requirements are included in state laws relating to "control, appropriation, use, or distribution" of water. Therefore, on its face, section 27 requires hydropower projects to comply with state water rights laws, including state flow requirements.[6]

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[6] The Ninth Circuit stated that section 27 is "somewhat ambiguous" because the words "control, appropriation, use, or distribution" are used in relation to "water used in irrigation or for municipal or other uses, or any vested right therein." App. 9. According to the court, these qualifying words might support the view that section 27 "limit[s] state authority to the area of property rights involving water for irrigation, municipal use, and related activities." App. 8. Section 8 of the 1902 Reclamation Act, however, contains similar qualifying language, for the words "control, appropriation, use, or distribution" in section 8 are used in relation to "water used in irrigation, or any vested right acquired thereunder." In *California v. United States*, this Court rejected the

The legislative history of section 27 strengthens the conclusion that state water laws apply to federally-licensed hydropower projects. According to the legislative history, Congress intended to follow the precedent of section 8 of the 1902 Reclamation Act and preserve the states' traditional water rights authority over hydropower projects. 51 Cong. Rec. 13625, 13630, 13361, 14070, 14071 (1914) (remarks of Reps. Ferris, Mondell, Taylor, Raker and Seldomridge). For example, the author of section 27 stated that the provision is "substantially the same as section 8 of the reclamation law," and that hydropower projects "will have to come in on an equality with all other water users and acquire and use their water rights under our State water-rights laws. . . ." 51 Cong. Rec. 13631, 14071 (remarks of Rep. Taylor); see note 2, *supra*. Another proponent of section 27—who was the primary author of section 8 of the 1902 Reclamation Act—stated that:

> "The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water or to use a drop of water for the turning of any wheel or turbine. *That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people through the authorities they have provided in the States.*" 51 Cong. Rec. 13630 (1914) (remarks of Rep. Mondell) (emphasis added).

The legislative history also indicates that, in Congress' mind, the states "own" the water and the federal government owns the public lands; Congress wanted to develop a federal program that would make federal lands available for hydropower projects without diminishing state water rights authority over the projects. S. Rep. No. 66, 64th Cong., 1st Sess. 9 (1916); H.R. Rep. No. 16,

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argument that these qualifying words indicate that section 8 is limited to "proprietary rights." 438 U.S. at 675. Therefore, the same argument should be rejected in construing section 27.

In a post-*First Iowa* decision, this Court expressly rejected its view in *First Iowa* that the qualifying words in section 27 indicate that the provision does not apply to hydropower water uses. *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954).

64th Cong., 1st Sess. 14 (1916). For example, a Senate report stated that:

> "This bill distinctly recognizes the ownership and the right of control in the States of the use of the waters in the flowing streams of the States. . . . [¶] This bill . . . is not intended to trench upon the right of the State to the control of the water flowing in the streams within its borders. *It is framed upon the distinct theory that the State owns and controls the use of water flowing within the streams within its boundaries, and that the Federal Government owns and has the right to control and dispose of the public lands bordering and adjacent to such streams.* [¶] . . . Each must contribute its share. *The Federal Government must contribute the use of land, and the States must contribute the use of water. . . .*" S. Rep. No. 66, 64th Cong., 1st Sess. 4-5 (1916) (emphasis added).

The *First Iowa* Court cited—and indeed misconstrued—a small portion of the legislative history relevant to section 9(b), 328 U.S. at 174,[7] but did not cite the more extensive legislative history relevant to section 27, other than to note that section 27 follows the precedent of section 8 of the 1902 Reclamation Act. 328 U.S. at 176 n. 20.

Congress' traditional policy of deference to state water law further strengthens the conclusion that Congress deferred to state water law in enacting section 27. As this Court noted in *California*, Congress traditionally has followed a policy of "purposeful and continued deference to state water law." 438 U.S. at 653. Under the Desert Land Act of 1877, 19 Stat. 377, and other acts adopted earlier, Congress "severed" the water from the public

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[7] The *First Iowa* Court cited only Representative LaFollette's statement that section 9(b) preserved state "property rights" in water, inferring therefrom that section 9(b) is limited to state laws protecting *private* property rights. 328 U.S. at 174; 56 Cong. Rec. 9810 (1914) (remarks of Rep. LaFollette). In fact, LaFollette's statement was a reference to *state* proprietary interests under the equal footing doctrine, and this Court has held that such state proprietary interests include the right to *regulate* use of water. *California*, 438 U.S. at 654-655, 663; *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907).

domain lands, providing for state rather than federal regulation of water rights. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153-157 (1935); *California*, 438 U.S. at 657-658; *United States v. New Mexico*, 438 U.S. 696, 702 (1978). Under the equal footing doctrine, the states are deemed to possess sovereign ownership and control of all navigable waters within their borders, subject to the federal power to regulate and control navigation. *Shively v. Bowlby*, 152 U.S. 1, 14-15, 16, 49-50 (1894); *United States v. Oregon*, 295 U.S. 1, 14 (1935). Congress followed these severance and equal footing principles in authorizing state regulation of federal water uses under the 1902 Reclamation Act, *California*, 438 U.S. at 663-670, and followed the same principles in authorizing state regulation of hydropower projects under the FPA. Therefore, section 27 is in the mainstream of Congress' traditional policy in the field of water rights regulation, rather than a departure from its traditional policy.

B. FERC's "Comprehensive" Planning Authority

The Ninth Circuit held that FERC's "comprehensive planning authority" over hydropower projects supports the view that the FPA preempts state water laws. App. 7-8. This Court, however, has rejected the view that the "comprehensive" nature of a federal program, in itself, supports the view that federal law preempts state law. *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 414-415 (1973); *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983). In answering the preemption inquiry, the proper focus is on Congress' intent, not the "comprehensive" nature of its regulation. *Id.* Moreover, where Congress adopts an *anti-preemption* provision, such as section 27, Congress specifically manifests its intent and the "comprehensive" nature of its regulation is even less relevant. In cases involving an anti-preemption provision, it is improper to determine whether state law "conflicts" with federal law or its objectives, because Congress has directly answered the question by adopting the anti-preemption provision; the proper focus is on the meaning of the anti-preemption provision itself. *California Fed. Savings & Loan Ass'n v. Guerra*, ___ U.S. ___, 107 S.Ct. 683, 697 (1987) (Scalia, J., concurring); L. TRIBE, AMERICAN

CONSTITUTIONAL LAW, at 482 n. 8 (2d ed. 1988).[8] Since section 27 specifically limits the FPA's preemptive effect, the FPA does not preempt state water laws regardless of the "comprehensive" nature of its regulatory scheme.

Additionally, Congress presumptively does not intend to preempt state laws in an area traditionally regulated by the states. As this Court has stated:

> "When Congress legislates in a field *traditionally occupied* by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.' " *California v. ARC America Corp., et al.*, ___ U.S. ___, 109 S.Ct. 1661, 1665 (1989), quoting from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).

Since the states have traditionally regulated water rights, it is unlikely that Congress intended to displace traditional state water rights authority over hydropower projects. Nothing in the FPA reflects a "clear and manifest purpose" to preempt state water laws, and indeed section 27 specifically defers to state laws.

In other contexts, Congress has provided for concurrent state jurisdiction over activities regulated under federal law, particularly activities affecting use of water. For example, the Rivers and

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[8] According to Professor Tribe:

> "The governing statute may . . . restrict its own preemptive effect. . . . When this is the case, it seems quite improper for a court even to *ask* whether a challenged state law . . . 'conflicts' in some more nebulous sense with the federal statute or its objectives. To engage in such a broader inquiry is to forget that preemption is ultimately a matter of *construing* a federal statute; when the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path." TRIBE, AMERICAN CONSTITUTIONAL LAW, at 482; see also *id.* at 510-511 (emphasis in original).

Harbors Act of 1899 (RHA), 33 U.S.C. §§ 401, 403, authorizes the Army Corps of Engineers to exercise permit authority over activities affecting navigability of water. The Army Corps of Engineers' permit authority extends to diversions from navigable waters that are authorized under state water rights laws. *California v. Sierra Club*, 451 U.S. 287 (1981). In exercising its permit authority, the Army Corps of Engineers considers many of the same "public interest" factors that the states consider in exercising water rights authority over the diversions. 33 CFR § 320.4(a), 40 Fed. Reg. 31326-31327 (1975). Nonetheless, this Court has held that a person acquiring an Army Corps of Engineers permit must also acquire a state water right permit, and must fully comply with conditions attached to the state permit. *Cummings v. Chicago*, 188 U.S. 410, 431 (1903). As this Court has stated in another context, the issuance of the federal license is "simply acknowledgement that the activity does not violate federal law, and is not an exemption from state licensing or police power requirements." *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). Similarly, a FERC license is simply an "acknowledgement" that the project does not violate federal law, not an exemption from state water rights laws.[9]

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[9] Congress has provided for concurrent state jurisdiction over other kinds of federally-licensed activities. See, *e.g., Pacific Gas & Elec. Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983) (state has right to economically regulate nuclear power facilities licensed by the Atomic Energy Commission); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 207-208 (1944) (state has right to apply licensing requirements to custom house brokers licensed under federal law); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (state has right to apply licensing requirements to marine terminal facilities licensed under federal law); *Rice v. Rehner*, 463 U.S. 713 (1983) (state has right to apply licensing requirements to Indian traders on Indian reservations licensed under federal law); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state may impose certification requirements to agricultural commodities certified under federal marketing orders); *Hillsborough County Florida v. Automated Medical Laboratories*, 471 U.S. 707 (1985) (state has right to apply operating requirements to blood plasma vendors licensed under federal law); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (state has right to regulate smoke emissions from vessels licensed under federal law); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (state conservation laws apply to fish traps authorized under permits issued by U.S. Forest Service).

In administering their water rights laws, the states make important policy judgments concerning public and private needs—municipal, agricultural, industrial and instream needs—that are dependent on the scarce water supply. In the arid West, the allocation of water among these competing needs determines in large measure the states' economic growth and environmental quality. Under the Ninth Circuit decision, FERC would be able to override the states' policy judgments by allocating disproportionate quantities of water *exclusively* for hydropower uses, thus limiting availability of water for other public and private needs that are vital to the state's economic or environmental interests. In effect, FERC would function as a super water rights agency, with ultimate authority to determine how much water is available for hydropower uses and competing uses. In enacting section 27, Congress intended that the states would retain their traditional water rights authority to make these policy judgments. The Ninth Circuit decision undermines this congressional purpose by diminishing state water rights authority. This Court should grant review to reaffirm Congress' policy of deference to state water law, as it did nine years ago in *California*.

III. THE NINTH CIRCUIT DECISION PRECLUDES UNIFORM STATE REGULATION OF WATER RIGHTS, RESULTING IN POTENTIALLY INCONSISTENT REGULATION OF RIGHTS IN THE SAME RIVER

The Ninth Circuit decision exempts private hydropower projects from state water laws that apply to all other water users in the same river. Indeed, the decision exempts hydropower projects from state laws that—after *California*—apply to federal water projects authorized by Congress itself. In effect, the decision creates two bodies of law in the same river: a body of FERC-created law applicable to private hydropower projects, and a body of state law applicable to all other users. In *California*, this Court commented unfavorably on the "legal confusion that would arise if federal water law and state water law reigned side by side in the

same locality." 438 U.S. at 699. The Ninth Circuit decision creates "legal confusion" by precluding uniform state regulation of water rights in individual stream systems.

By precluding uniform water rights regulation, the Ninth Circuit decision results in potentially inconsistent regulation of water rights in the same river. For example, suppose that a private hydropower project in a river is sandwiched between an upstream municipal diversion project and a downstream federal reclamation project. Clearly the upstream municipal project must comply with state water law. After *California*, the downstream federal project must also comply with state law. Under the Ninth Circuit decision, the hydropower project located between these projects need *not* comply with state law. Thus, the decision allows private hydropower projects to avoid state regulation that applies to all other users in the same river.

Because of the interdependency of water rights, the states cannot effectively administer their water rights systems if some users are subject to state law and others are not. For example, if the state establishes minimum flow requirements for all users in order to protect downstream fish resources, the state cannot effectively administer the flow requirements unless all users—including hydropower projects—are subject to the requirements; otherwise, the hydropower projects could capture for their own use the minimum flows that the state requires to bypass the other projects. Therefore, the Ninth Circuit decision, by exempting hydropower projects from state laws applicable to others, precludes states from effectively regulating *non-power* uses clearly within their jurisdiction. The decision makes it impossible for states to provide for coordinated management and control of water rights.

This Court has recognized that water rights are "highly interdependent," and that such interdependency supports the need for "comprehensive state systems for adjudication of water rights." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Because of interdependency of water rights, it is more important that hydropower projects are governed by a uniform *state* rule applicable to all users in the same river than by a uniform *national* rule applicable only to hydropower

projects. As this Court has stated, " 'it is essential that each and every owner along a given water course . . . must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.' " *California*, 438 U.S. at 678-679, quoting from S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951). In short, the interdependency of water rights supports the need for uniform state regulation of such rights. The Ninth Circuit decision precludes uniform state regulation by exempting hydropower projects from state laws applicable to other users.

Additionally, the Ninth Circuit decision results in inconsistent regulation of *hydropower* uses, for it preempts state laws as applied to power uses of *private* projects but not as applied to power uses of *federal* projects. Federal reclamation projects often store and release water for multiple purposes, including power purposes. Under section 8 of the 1902 Reclamation Act, state water laws apply to *all* purposes of federal reclamation projects, including power uses. *United States v. California*, 694 F.2d 1171, 1179-1180 (9th Cir. 1982) (on remand of *California v. United States*, state water laws held to apply to power uses of federal New Melones Project). The FPA does not preempt state laws applicable to power uses of federal projects because the FPA does not apply to such projects. See *Uncompahgre Valley Water Users Ass'n v. Federal Energy Regulatory Comm'n*, 785 F.2d 269 (10th Cir. 1986). Therefore, under the Ninth Circuit decision, state water laws apply to power uses of *federal* projects but not to power uses of *private* projects. There is no basis in law or policy for exempting private power projects from state laws that apply to federal power projects.

IV. CONTRARY TO THE NINTH CIRCUIT DECISION, THERE IS NO CONFLICT IN THIS CASE BETWEEN STATE AND FEDERAL REGULATION OF THE ROCK CREEK PROJECT

In petitioner California's view, section 27 authorizes the states to exercise water rights authority over hydropower projects licensed by FERC, and therefore authorizes the states to deny water rights permits for projects that are unable or unwilling to comply with state laws. In this case, however, California has not

exercised its authority to deny a water right permit for the project. Rather, California has granted a water right permit, thus authorizing the project to divert water under California law. This case is distinguishable from *First Iowa* on this ground because, in *First Iowa*, the Iowa statute effectively vetoed the project by prohibiting construction of the dam. *First Iowa*, 328 U.S. at 166-167.

Moreover, the state flow requirements in this case are not in conflict with the FERC flow requirements, because the state requirements are more stringent than the FERC requirements. The project, in complying with the more stringent state requirements, will necessarily comply with the less stringent FERC requirements. The project can meet its obligations under both federal and state requirements, and is not required to choose between them. Hence, there is no conflict between the state and federal flow requirements in this case.

The Ninth Circuit ruled otherwise, stating that the state requirements "would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project." App. 12. In fact, FERC conducted no hearing to determine the effect of the state flow requirements on the project. Hence, the record is devoid of any evidence concerning the effect of the state requirements on the project's economic feasibility. In effect, the Ninth Circuit held that the state conditions are facially void regardless of their effect. The Ninth Circuit decision cannot be reconciled with this Court's recent decision in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), which holds that, to the extent possible, facial preemption challenges to state environmental regulation should be rejected. 480 U.S. at 593.[10]

[10] The Ninth Circuit decision is inconsistent with *Granite Rock* in a more fundamental respect. In *Granite Rock*, this Court held that Congress' mining statutes—although preempting state "land use" regulation of mining activity on federal lands—do not preempt state "environmental" regulation of such activity. 480 U.S. at 587. According to the Court, state "land use" regulation "chooses particular uses for the land;" state "environmental" regulation, on the other hand, "does not mandate particular uses of land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* California's regulations in the instant case consist of "environmental" regulation rather than "land use" regulation, for California has granted a water right permit and has imposed minimum flow requirements to mitigate the project's harmful environmental effects on downstream fish resources. Thus, under *Granite Rock* California has the right to apply its flow requirements here. Indeed, California's position is stronger here than in *Granite Rock*, for the FPA contains a specific anti-preemption provision—section 27—and no similar anti-preemption provision was involved in *Granite Rock*.

CONCLUSION

For the foregoing reasons, it is requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX 1

For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 87-7538
Proj. No. 3189

State of California,
ex rel State Water Resources Board,
Petitioner,
v.
Federal Energy Regulatory Commission,
Respondent,

Rock Creek Limited Partnership,
Intervenor.

OPINION
Petition for Review of a Decision of the
Federal Energy Regulatory Commission

Argued and Submitted
December 16, 1988—San Francisco, California
Submission Withdrawn January 5, 1989
Resubmitted January 27, 1989

Filed June 6, 1989

Before: Procter Hug, Jr., Thomas Tang and
Robert Boochever, Circuit Judges.

Opinion by Judge Hug

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OPINION

HUG, Circuit Judge:

The State of California petitions us to review the Federal Energy Regulatory Commission's decision finding exclusive federal control over the setting of hydroelectric power project water flow rates. After examining the preemption implications of the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a-828c (1982 & Supp. V 1987), we affirm the Commission's conclusion that the Act awards the federal government sole authority to set flow rates.

BACKGROUND

Rock Creek is a small tributary of the South Fork of the American River near Placerville, California. Rock Creek runs entirely within the state of California and lies on public lands administered by the U.S. Bureau of Land Management.

The Rock Creek Limited Partnership chose the creek as the site for a small hydroelectric power project. They proposed a project that will consist of a concrete diversion dam located about one mile upstream from Rock Creek's confluence with the American River. The dam will divert water through a tunnel into three penstocks, and then into a powerhouse equipped with three turbine generators having a total capacity of 3,000 kilowatts. After passing through the powerhouse, the water will empty into the American River about one mile down stream. The penstocks and powerhouse will be built on the site of an older powerhouse and

penstock complex. The project is expected to generate about 7,000 megawatt-hours of electricity annually. The Pacific Gas & Electric Company will purchase the project's power.

The dam will divert some of the water flow from Rock Creek into the power project and leave the remainder of the water to flow in its natural course in Rock Creek. The minimum amount of water flow that must be left in Rock Creek, denominated the "minimum flow rate," is the principal point at issue in this case.

In April, 1983, after submission of an application by the Partnership, the Federal Energy Regulatory Commission ("FERC") issued a license for the project's construction and operation. Article 37 of the license fixed an interim minimum flow rate of eleven cubic feet per second ("cfs") from May to September, and fifteen cfs from October through April. These flow rates would apply until the project's sponsors satisfied the provisions of Article 38, which requires the owners to conduct long-term minimum flow rate studies in conjunction with the California Department of Fish and Game ("DFG").

In February, 1984, the California State Water Resources Control Board ("WRCB") issued two permits to the project for the appropriation of Rock Creek's water. These permits incorporated the federal license's interim minimum flow figures and reserved jurisdiction to the WRCB to set permanent rates after completion of the long-term studies. The permits noted that Rock Creek serves as an important source of adult trout for the Rock Creek-American River system. California law in effect at the time the permits were issued charged the WRCB with subjecting appropriations "to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest" the water affected by the permits. Cal. Water Code § 1257 (West 1971).[1]

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[1] California cites the Water Code at section 1257.5 for the proposition that the WRCB may impose streamflow requirements necessary to protect fish and wildlife. Cal. Water Code § 1257.5 (West Supp. 1989). California added this provision to its Code in 1985. The WRCB issued the Rock Creek permits in 1984. Section 1257.5, therefore, does not apply.

In July, 1986, the project's sponsors petitioned for a declaratory order stating that FERC had exclusive jurisdiction to establish permanent minimum flow rates. About eight months later, in March, 1987, FERC issued a declaratory order in which it held that "[t]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process under section 10(a) of the Federal Power Act." 38 FERC ¶ 61,240 (1987) (footnote omitted). In addition to citing the FPA, the Commission relied on *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), for authority to preempt state regulation of flow rates.

A few days after FERC issued its declaratory order, the WRCB amended its permits in response to the DFG's completion of the fishery studies. On the DFG's recommendation and after a hearing in which the project's sponsors disputed the studies, the WRCB increased minimum flow rates to permanent levels of sixty cfs from March through June and thirty cfs from July through February. In the order amending the permits the WRCB stated that *First Iowa* did not support federal preemption of this issue and that the WRCB had "jurisdiction in this matter to regulate the Rock Creek project, notwithstanding the concurrent exercise of jurisdiction over other aspects of the project by FERC." WRCB Order WR 87-2 (1987).

The State of California then filed with FERC a motion for intervention on behalf of the WRCB and requested a rehearing of the declaratory order. The rehearing petition raised as its sole argument the question of federal preemption under the FPA of flow rate setting powers. FERC granted the intervention motion but denied, in November, 1987, the rehearing request.

California filed a timely petition in this court in December, 1987, seeking review of the declaratory order and the order denying rehearing. It presents the issue of whether the FPA vests exclusive authority in FERC to set minimum flow requirements for hydroelectric power projects licensed under the Act.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 16 U.S.C. § 825*l*(b) to review decisions issued by the Commission. Our jurisdiction is limited to objections raised in the petitioner's application for rehearing before the Commission. 16 U.S.C. § 825*l*(b) (1982); *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988).

Our review of the decision at issue in this appeal is respectful but searching. Generally, we may reverse the Commission's orders only if we find them arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with law. 5 U.S.C. § 706(2)(A) (1982); *City of Centralia, Wash. v. FERC*, 799 F.2d 475, 481 (9th Cir. 1986); *The Steamboaters v. FERC*, 759 F.2d 1382, 1388 (9th Cir. 1985). California challenges, however, the Commission's determination of purely legal questions involving the construction of the FPA. Since this case involves only issues of statutory interpretation, the high degree of deference associated with the arbitrary and capricious standard, *see Nat'l Wildlife Fed'n v. Burford*, No. 87-4375, slip op. at 3272-73 (9th Cir. March 30, 1989), is considerably relaxed. While we accord deference to the construction of a statute by those charged with its administration, *Filiberti v. Merit Sys. Protection Bd.*, 804 F.2d 1504, 1508 (9th Cir. 1986); *City of Centralia*, 799 F.2d at 481, we keep in mind that the courts are the final authorities on issues of statutory construction, *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *Tulalip Tribes of Wash. v. FERC*, 732 F.2d 1451, 1454 (9th Cir. 1984). The justification for deference to an agency's interpretation of a statute decreases when the statutory construction requires consideration of broad concerns beyond the agency's expertise. *Grunfeder v. Heckler*, 748 F.2d 503, 505 (9th Cir. 1984) (en banc). The FERC decision in this case deals not with the technical aspects of the FPA but with general issues of preemption and the division of regulatory authority between state and federal governments. These subjects belong to the sphere of judicial rather than agency expertise.

ANALYSIS

California asserts that neither the terms of the FPA nor case law interpreting it authorize federal preemption of state laws dealing with the acquisition of water rights and the conditions attached to the exercise of those rights. California offers two main lines of argument. First, it claims that section 27 of the FPA, codified at 16 U.S.C. § 821 (1982), is an anti-preemption provision requiring projects licensed under the FPA to comply with state water rights and usage laws. Second, it argues that *First Iowa* is distinguishable and not on point. California relies heavily on the FPA's legislative history and on the Supreme Court's holdings in *California v. United States*, 438 U.S. 645 (1978), for these arguments.

Against California's contentions, FERC argues that the FPA vests comprehensive hydropower planning authority in the federal government genrally and in FERC specifically. It claims that this authority amounts to a clear grant of preemption. It also argues that *First Iowa* recognized and approved this preemption and that *California v. United States* is irrelevant to the issues at hand.

I. *Preemption*

Preemption analysis always starts with the presumption that Congress did not intend to displace state law. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). However, as the Court has stated:

> Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so prevasive as to make reasonable the inference that Congress left no room for the states to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominate that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it might reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947). "Even when Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 240 (1983). A state law conflicts with federal law when it is physically impossible to comply with both or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Our task is to examine the FPA to determine how Congress intended to divide authority between the states and the federal government over hydropower projects. We look to whether the WRCB's retention of jurisdiction over the flow rates conflicts with the FPA.

II. Statutory Interpretation

Before considering case law and legislative history, a court reviewing a statutory construction must turn to the statute itself. *Touche Ross and Co. v. Redington*, 442 U.S. 560, 568 (1979). Examining a statute's meaning entails looking at the statute as a whole, not at individual sections in a vacuum. *See Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1259 (1988); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 401 (1987).

Although not dispositive of the preemption issue, the statute read in its entirety strongly suggests that Congress intended the FPA to vest final authority for the regulation of hydroelectric power projects in federal hands. The following sections illustrate Congress' general intent to preempt the hydropower field to the exclusion of state controls: Section 4(e), 16 U.S.C. § 797(e) (Supp. V 1987) ("The Commission is authorized and empowered—To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, [and] powerhouses . . . for the development, transmission, and utilization of power . . . in any of the streams or other bodies of water which Congress has jurisdiction. . . . "); Section 10(a), 16 U.S.C. § 803(a)(1) (Supp. V. 1987) ("All licenses issued . . . shall be on the following conditions: That the project . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of

water-power development . . . [and] if necessary . . . to secure such plan the Commission shall have authority to require the modification of any project. . . ."); and Section 7(a), 16 U.S.C. § 800(a) (Supp. V. 1987) ("In issuing preliminary permits . . . or original licenses . . . the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region."). To execute this general planning power, Congress gave FERC specific powers under the FPA to issue preliminary permits (§§ 4(f) and 5, 16 U.S.C. §§ 797(f) and 798 (1982)); investigate power development resources (§ 4(g), 16 U.S.C. § 797(g) (1982)); mandate prompt construction schedules in the license's terms (§ 13, 16 U.S.C. § 806 (1982)); grant licenses for a limited term of fifty years (§ 6, 16 U.S.C. § 799 (1982)), after which the Commission may take over the project on behalf of the United States on payment of just compensation (§ 14(a), 16 U.S.C. § 807(a) (1982)); to control the precise terms of the license (§ 6, 16 U.S.C. § 799 (1982)); and to award powers of eminent domain to licensees (§ 21, 16 U.S.C. § 814 (1982)). The weight of the comprehensive planning authority and the individual powers assigned to support that authority falls quite heavily on the side of federal exclusivity.

The language of one FPA provision, however, forestalls reaching with certainty the conclusion that the FPA manifests a clear congressional intent to preempt state regulations in every aspect of the hydropower domain. Section 27, codified at 16 U.S.C. § 821 (1982), states that "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." The difficulty with section 27 arise from the fact that its language can support two conflicting readings. One reading would construe the section to limit state authority to the area of property rights involving water for irrigation, municipal use, and related activities. Under this reading, any aspect of operating a hydropower project not implicating these rights would fall under exclusive federal regulation. A second reading would construe the section much more broadly as an anti-preemption clause that

gives the states final authority over all issues connected to the control and use of water by a project licensed under the FPA. This interpretation would support the idea that the states, not the federal government, have the last word over matters such as minimum flow rates. Since the provision's plain meaning is somewhat ambiguous, resolution of the preemption issue requires a turn to sources outside the statute.

III. Case Law

California would resolve section 27's ambiguity by drawing on the section's legislative history and the Supreme Court's holdings in *California v. United States*, 438 U.S. 645 (1978). Because Supreme case law settles the preemption issue, California's legislative history argument does not require extensive discussion.

California draws heavily on the *California v. United States* opinion. In that case, the Supreme Court interpreted section 8 of the Reclamation Act of 1902, whose language is virtually identical to that in the FPA's section 27, to mean that the states may impose any condition on a water rights permit that is not inconsistent with congressional directives authorizing the reclamation project in question.[2] More specifically, the court held that the "section does, of course, provide for the protection of vested water rights, but it also requires the Secretary [of the Interior] to comply with state law in the 'control, appropriation, use, or distribution of water.' . . . The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675. This conclusion led the court to uphold WRCB permit conditions that required the United States to provide, among other things, a specific water use

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[2] Section 8, codified at 43 U.S.C. § 383 (1982), reads in relevant part, "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws. . . ."

plan before acquiring the water. In the course of its opinion, the court expressly disavowed what it deemed to be *dicta* in other cases that had restricted section 8's savings scope to proprietary laws alone. *California*, 438 U.S. at 672-75 (disapproving the interpretations of section 8 in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958), and *City of Fresno v. California*, 372 U.S. 627 (1963)).

Since section 8 predates section 27, and apparently served as a drafting model for section 27, California argues that the *California* holding applies to section 27. This assertion leads California to conclude that its minimum flow requirements imposed on the Rock Creek project are therefore binding.

The difficulty California faces in making this argument is that other cases construing section 27, and its relation to section 8, have rejected California's reasoning. The leading case addressing section 27 is *First Iowa*, 328 U.S. 152. In *First Iowa*, the Supreme Court held that a provision of the FPA not at issue here, section 9(b), 16 U.S.C. § 802 (Supp. V. 1987), did not require the Commission to withhold a project license until the project's sponsors complied with requirements for state permits under Iowa law. In reaching this conclusion, the Court found cause to construe the FPA as a whole in order to determine Congress' intent on the question of preemption. The Court reasoned that the FPA expresses Congress' intent to concentrate comprehensive hydropower planning authority in the Commission. Allowing states to impose requirements that hobbled this planning power struck the Court as tolerating "a veto power . . . [that] would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend on the judgment of the Federal Power Commission or other representatives of the Federal Government." *First Iowa*, 328 U.S. at 164 (footnote omitted). This interpretation of the FPA led the Court to disapprove the argument, among others, that the proposed project must conform to a state statute dealing with the permit terms and conditions the state may impose to protect fish life. *Id.* at 165-66.

In the course of construing the FPA as a whole, the Court offered an extensive commentary on section 27. The FPA, according to the Court, apportions authority over various aspects of

hydropower regulation between the federal government and the states. *Id.* at 167, 171. This division of power means not that the state and federal government shall have final decision making powers over the same issue, *id.* at 167-68, but rather that each entity shall have its own specific domain of control. Section 27, in the Court's reading of the FPA, describes the areas of control given to the states. The Court explicitly commented that the areas saved for state regulation are narrow in scope.

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. *It therefore has primary, if not exclusive, reference to such proprietary rights.* . . . There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

Id. at 175-76 (emphasis added). This reading of section 27 and the FPA as a whole teaches that Congress intended federal law to preempt state regulation in all aspects of hydropower projects save for the limited proprietary exceptions specified in the section.[3]

California rejects *First Iowa* as controlling authority for three reasons. First, it claims that the Court's comments on section 27 constitute *dicta*. This argument is weak. As noted above, statutory construction entails looking at the statute as a totality, not in piecemeal fashion. Construing section 27 and other parts of the FPA was essential to the Court's preemption analysis of section 9(b). Dismissing *First Iowa*'s comments on section 27 as *Dicta* is improper.

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[3] We asked the parties to provide supplemental briefing on the issue of whether California's rights, if any, in Rock Creek's fish and fishery uses amounted to a proprietary right covered by section 27. Assuming, for purposes of argument only, that California has such rights, we conclude that they do not fall within *First Iowa's* narrow definition of the municipal and irrigation proprietary rights reserved for state control under section 27.

Second, California contends that *California v. United States* effectively overrules *First Iowa*'s interpretation of section 27, be it dicta or binding precedent. We find this argument unconvincing. The Supreme Court makes no reference to *First Iowa* in the *California* opinion. If the Court had intended to criticize or disapprove *First Iowa* it would have done so, just as it specifically disapproved the *dicta* of *Ivanhoe* and *City of Fresno*. A more reasonable interpretation of *First Iowa* and *California* is that they address two different and entirely separate water use programs. One federal court has held that the two cases do indeed address fundamentally different statutes. "In *California v. United States*, the Supreme Court dealt with a statute distinct in both purpose and history from that at issue in *First Iowa*. . . . Notwithstanding similarity in wording of the statutes, they serve different objectives, and relate to federal actions fundamentally dissimilar in nature." *Town of Springfield, Vermont v. McCarren*, 549 F. Supp. 1134, 1154 (D. Vt. 1982), *aff'd* 722 F.2d 728 (2d Cir. 1983), *cert. denied*, 464 U.S. 942 (1983). We agree with this assessment. We conclude that *California*'s interpretation of the 1902 Reclamation Act does not affect *First Iowa*'s interpretation of the FPA. *First Iowa* continues to be cited by the Supreme Court and other federal courts as the authoritative interpretation of the FPA. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982); *Town of Springfield, Vermont v. Vermont Environmental Bd.*, 521 F. Supp. 243, 248-250 (D. Vt. 1981).

Finally, California argues that its flow requirements do not amount to a veto, in *First Iowa*'s use of the term, of the Rock Creek proposal. This argument is also unpersuasive. Changing the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project. It would, in essence, create a different type of hydropower project from the one described in the license. In effect, this does not constitute a veto of the project that was approved and licensed by FERC.

IV. Legislative History

California devotes a considerable part of its brief to a review of section 27's legislative history in an attempt to show that Con-

gress intended the section to be a broad anti-preemption provision. The Supreme Court, however, considered the section's legislative history in *First Iowa* and concluded that it supported a preemption reading. *First Iowa*, 328 U.S. at 176 n.20. The Supreme Court's assessment of this legislative history is dispositive.

CONCLUSION

Our reading of the FPA combined with the Supreme Court's teachings in *First Iowa* convince us that Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary rights remains in state hands. The WRCB's state law powers to impose conditions on water use in this case conflict with congressional purposes and objectives expressed in the FPA. The WRCB must yield, consequently, to FERC in this matter. We affirm the Commission's decision and its denial of rehearing.

AFFIRMED.

APPENDIX 2

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa, Charles G. Stalon,
Charles A. Trabandt and C. M. Naeve.

Rock Creek Limited Partnership
Project No. 3189-014

ORDER IN RESPONSE TO REQUEST FOR DECLARATORY ORDER AND PROVIDING FOR HEARING

[Issued March 11, 1987]

On April 29, 1983, the Director, Office of Electric Power Regulation, issued a license for the Rock Creek Project No. 3189, located on Rock Creek, in El Dorado County, California.[1] Article 37 of the license requires the licensee, Rock Creek Limited Partnership (Rock Creek),[2] to release interim minimum flows of 11 cubic feet per second (cfs) from May through September, and 15 cfs from October through April, or the inflow to the reservoir, whichever is less, in the by-passed reach of the project for the protection of fishery resources.[3] Article 38 of the license required Rock Creek, in consultation with the California Department of

[1] *See* 23 FERC ¶ 62,137 (1983).

[2] The license was originally issued to Joseph M. Keating. On September 10, 1985, the Director, Office of Hydropower Licensing, approved a transfer of the license from Mr. Keating to Rock Creek. *See* 32 FERC ¶ 62,566 (1985).

[3] 23 FERC at 63,204. Article 37 provides:

> Licensee shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule or the inflow to the reservoir, whichever is less: May through September—11 cubic feet per second (cfs) and October through April—15 cfs. These flows may be temporarily modified if required by operating emergencies beyond the control of the Licensee, for studies required by Article 38, and for short periods for fishery management purposes upon mutual agreement between the Licensee and the California Department of Fish and Game.

Fish and Game (CDFG) and the U.S. Fish and Wildlife Service (FWS), to conduct studies to determine the minimum flow release and other measures needed to ensure protection and enhancement of fishery resources in the by-passed reach. This article also required Rock Creek, within one year from the issuance of the license, to file a report of its findings and, for Commission approval, its recommendations for a minimum flow release and other fishery protection and enhancement measures.[4]

The Director, Office of Hydropower Licensing (Director), subsequently granted Rock Creek two extensions of time to file the report required by Article 38 of the license. On October 4, 1985, nearly two and one-half years after the license was issued, Rock Creek filed its Article 38 study. It recommended therein that the interim minimum flows of Article 37 of the license be adopted as the permanent minimum flows for the project. On April 22, 1986, in response to a January 22, 1986 request from the Director, Rock Creek filed additional information regarding its report and recommendations.

On December 6, 1985, CDFG filed comments on Rock Creek's report and minimum flow recommendations. CDFG contended that the methodology used by Rock Creek to obtain its flow recommendations was flawed. CDFG recommended that Rock Creek be required to release on a permanent basis 30 cfs or

[4] *Id.* Article 38 provides:

> The Licensee shall, in consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, conduct studies to determine the minimum flow release and other measures needed to ensure protection and enhancement of the fishery resources in Rock Creek between the dam and the powerhouse. Further, Licensee shall, within 1 year from the date of issuance of this license, file a report of its findings and, for Commission approval, recommendations for a minimum flow release and for other fishery protection and enhancement measures needed in Rock Creek between the dam and powerhouse. Agency letters of comment on the report and recommendations shall be included in this filing.

inflow, whichever is less, from October 1 to February 29, and 60 cfs or inflow, whichever is less, from March 1 to September 30. Rock Creek responded to CDFG's comments in a letter filed with the Commission on January 31, 1986.

Following the issuance of the license, Rock Creek obtained water right permits from the State of California for its project. These permits contained a provision specifying that Rock Creek was to release the same interim minimum flows as provided for in the license issued by the Commission. The permits also reserved to the California Water Resources Control Board (WRCB) the right to alter the interim minimum flows specified in the water right permits. On July 9, 1986, as supplemented September 5, 1986, Rock Creek, in response to the fact that WRCB had begun a proceeding to establish its own set of permanent minimum flows for the project, petitioned the Commission for a declaratory order confirming that the Commission has the exclusive jurisdiction to set minimum flows for the project, and that Rock Creek is to comply with the interim flow provisions of Article 37 of the license irrespective of any action taken by WRCB. Alternatively, Rock Creek requested that the Commission initiate a hearing to establish a permanent minimum flow for the project. With regard to this alternative request, Rock Creek asserted that: (1) Article 37 of the license confers on it a right to operate the project under the interim minimum flows for at least three to five years until sufficient experience has been acquired to set permanent flows; (2) the Commission did not reserve to itself in Articles 37 or 38 the authority to alter the interim flows without Rock Creek's consent; (3) the Commission can modify the interim flows only by following the procedures specified in Standard Article 15 of its license;[5] and (4) the interim flows are to be presumed adequate until otherwise demonstrated by the Commission.

[5] Standard Article 15 provides:

> The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the

On February 13, 1987, Rock Creek filed an emergency request for expedited action on its previous petition, indicating that on February 6, 1987, WRCB issued a draft order modifying the flows in the water right permits to the 30 and 60 cfs advocated by CDFG, and that WRCB was going to adopt the draft order at a WRCB meeting on either March 4 or 5, 1987. The draft order, which was attached to Rock Creek's request, states that WRCB has jurisdiction to determine minimum flows for the project and that the Commission-set flows are overridden unless they are stricter than those set by WRCB. On February 6 and 17, 1987, in response to a Director's December 10, 1986 additional information request, Rock Creek filed documents with the Commission wherein it alleged that the 30 and 60 cfs flows proposed for adoption in WRCB's order would render the project economically infeasible.

DISCUSSION

Minimum Flows at Licensed Projects Are Subject to the Commission's Exclusive Jurisdiction

As we explained recently in *South Fork Resources, Inc.*, 36 FERC ¶ 61,331 (1986), matters that are within the Commission's exclusive purview when licensing projects are not properly the subject of state regulation. The imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process under Section 10(a) of the Federal Power Act (FPA).[6] As such, the establishment of minimum flows is a matter beyond the reach of state regulation. Allowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing, such as fishery protection and project economics, and would essentially

> Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after the notice and opportunity for hearing.

[6] 16 U.S.C. § 803(a). The FPA was amended by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495 (Oct. 16, 1986); however, the license for Project No. 3189 was issued prior to the enactment of ECPA.

vest a veto authority over projects in the states. As the U.S. Supreme Court explained in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 164 (1946), "[s]uch a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgement of the Federal Power Commission." Consequently, WRCB has no authority to set minimum flows for the project that conflict with those contained in the license, and Rock Creek must comply with the flow requirements of Article 37 of its license until otherwise ordered by the Commission, irrespective of any action taken by WRCB. [7] [8]

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[7] The draft WRCB order suggests that control over the appropriation of water and hence minimum flow remains with the state pursuant to Section 27 of the EPA, 16 U.S.C. § 821. However, any authority provided to the states by Section 27 must yield when in conflict with the federal role in licensing. Furthermore, Section 27 has been held to only protect "proprietary" rights, *i.e.*, it only establishes a right of compensation for vested water rights taken by a Commission license. *See First Iowa*, 328 U.S. at 176, and *Portland General Electric Co. v. FPC*, 328 F.2d 1965 (9th Cir. 1964).

[8] ECPA reaffirmed the Commission's exclusive authority to establish minimum flows for licensed projects. On April 17, 1986, immediately prior to Senate passage of S. 426, the Senate version of ECPA, Senator Baucus inserted into the *Congressional Record* a position paper advocating the amendment of the FPA to vest in the states control over the appropriation, diversion, and use of water by licensed projects. In a colloquy with Senator McClure, Chairman of the Senate Committee on Energy and Natural Resources, Senator Baucus agreed not to offer amendments to S. 426 to implement the recommendations of the position paper in exchange for Senator McClure's agreement to hold a hearing on the subject. *See* 99 CONG. REC. S4448-49 (April 17, 1986). A hearing was held by Senator McClure's committee on the subject on September 12, 1986. However, no amendments to ECPA regarding water rights were made either by the conferees during the conference held to reconcile the conflicting Senate and House versions of the legislation or by the House or Senate in adopting the Conference Report. Under Section 10(j) of the FPA, as added by ECPA, the Commission shall include conditions based upon recommendations

Commission's Authority To Modify Interim Flows

Rock Creek asserts that it has the right under its license to operate its project for three to five years to develop information necessary to establish a permanent minimum flow for the project. It contends that the license order's statement that the Article 38 study "would allow for a more detailed assessment of the impacts of the *project's operation* on fishery resources" (emphasis added)[9] means that the study has to continue after the project is operating and that the Commission cannot change the interim flows of Article 37 until a sufficient period of study has occurred.

Rock Creek's arguments are misplaced and ignore the actual wording of Article 38. That article provides that the study report has to be filed with the Commission within one year from the date of issuance of the license. The above reference to "project's operation" merely indicated that the anticipated effects of the project's operation had to considered as part of the Article 38 study. Thus, the license does not provide Rock Creek with the right to operate the project with the Article 37 interim flows for three to five years after the commencement of operation, and the Commission is not precluded from changing those flows at this time.[10]

Rock Creek also asserts that the Commission did not specifically reserve to itself in either Article 37 or 38 the right to modify

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submitted by state fish and wildlife agencies regarding pending license applications unless the Commission finds that adoption of such recommendations is inconsistent with the purposes and requirements of the FPA. As noted previously (n. 6, *supra*), the changes made by ECPA are not applicable to Project No. 3189, since the license for it was issued prior to the enactment of ECPA. Since Congress chose not to amend ECPA to vest control of water rights in the states after holding a hearing on the issue, Congress, in passing ECPA, confirmed the Commission's exclusive authority over water rights matters associated with licensed projects, including the authority to prescribe minimum flows for such projects.

[9] 23 FERC at 63,201.

[10] Rock Creek completed construction of the project and is operating it.

the Article 37 interim flows and, consequently, that the Commission can modify those flows only after following the notice and hearing provisions of Standard Article 15. However, once again, Rock Creek ignores the actual wording of Article 38.

Article 38 required Rock Creek to file within one year its fishery study and, "for Commission approval,"[11] its recommendations for a minimum flow release. Although we did not use the word "reserve", we believe that the "for Commission approval" language of the article clearly indicates that we would establish final flows for the project following the submittal of the fishery study and vested in us the authority to do so without resort to Standard Article 15 of the license. In any event, since, as explained next, we are setting this matter for hearing, we have met the procedural requirements of that article.[12]

Need For A Hearing

As discussed previously, Rock Creek recommends that the Article 37 interim flows be established as the permanent minimum flows for the project and that the higher 30 and 60 cfs flows recommended by CDFG would render the project economically infeasible. Our preliminary analysis of Rock Creek's contentions indicates that, based on the 50-year term of the license and taking into account investment tax credits and accelerated depreciation benefits, Project No. 3189 would be economically feasible over the 50-year term of the license with a levelized net annual benefit of approximately $26,000 if CFDG's recommended flows were adopted. However, our analysis also indicates that CDFG's recommended flows would cause Rock Creek to suffer an extended span of substantial financial loss during the license term: from

[11] *Id.*

[12] Rock Creek's contention that the interim flows are to be presumed adequate until otherwise demonstrated by the Commission also is misplaced. Although the Director concluded in the license order that, based upon then available information, the Article 37 minimum flows would not adversely affect the fishery resources of Rock Creek, no heightened level of proof is required to sustain new flows, so long as they are supported by substantial record evidence.

years 8 through 35, the project would operate at a loss. Such financial losses could jeopardize Rock Creek's ability to continue to operate the project.

Our preliminary analysis also indicates that flows in excess of the 11 and 15 cfs advocated by Rock Creek are necessary to protect and enhance the rainbow trout population and its habitat in the by-passed reach of the project. Our analysis also indicates that a schedule of higher flows ranging from 20 to 60 cfs can be established that would adequately protect and enhance the rainbow trout population but would not cause Rock Creek to suffer a net cumulative benefit loss in any year. Thus, it appears that minimum flows can be prescribed that would protect both the fishery resources and the financial viability of the project.

Given the importance of the fishery resources involved and the serious financial feasibility issues raised by this proceeding, and since it appears that there are material issues of fact in dispute,[13] we belive it would be appropriate to set the matter for hearing to more fully develop the record we will need to resolve the fishery resources/financial feasibility conflict. Accordingly, we are ordering the Chief Administrative Law Judge to designate a presiding Administrative Law Judge to conduct an expedited hearing on the issues set out below. As discussed *supra* at page 4, we have determined that we have exclusive jurisdiction with regard to the establishment of minimum flow requirements for this project and thus there is no need for it to be reexamined in the hearing. Consequently, the jurisdictional issue shall not be considered in the expedited hearing. Should they wish to have intervenor status, CDFG, WRCB, and the FWS shall notify the Commission within 30 days of the date of this order. Other entities may request participation in the hearing within 30 days from the date of this order, subject to Rules 214 and 504 (b)(12) of the Commission's rules of practice and procedure.

[13] *See* Cerro Wire and Cable v. FERC, 677 F.2d 1124, 1129 (D.C. Cir. 1982); General Motors Corp. v. FERC, 656 F.2d 791, at 798 n.20 (D.C. Cir. 1981).

The Commission orders:

(A) Rock Creek Limited Partnership shall release the flows specified in Article 37 of its license for Project No. 3189 until otherwise ordered by the Commission.

(B) A presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge, shall conduct an expedited hearing to consider the following factual issues in this proceeding:

(1) the minimum flows necessary to protect and enhance the rainbow trout population, including adult, spawning, and fry habitat, in the by-passed reach of Project No. 3189;

(2) the impact on project operations and financial and economic feasibility of the minimum flows recommended by any party to the proceeding; and

(3) alternative mitigation measures, if any, that could be imposed to reduce the amount of minimum flows necessary to protect and enhance the above-described fishery resources, and the impact on project operations and financial and economic feasibility of such alternative mitigation measures.

(C) The presiding Administrative Law Judge shall hold a prehearing conference in this proceeding no later than 45 days from the date of this order.

(D) Upon filing a notice for intervenor status, the California Department of Fish and Game, the California Water Resources Control Board and the U.S. Fish and Wildlife Service shall be made parties to the hearing as prescribed by Ordering paragraph (B).

By the Commission.

(SEAL)

/s/ KENNETH F. PLUMB
Kenneth F. Plumb,
Secretary.

APPENDIX 3

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
Martha O. Hesse, Chairman; Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt
and C. M. Naeve.

Rock Creek Limited Partnership
Project No. 3189-015

ORDER DENYING REHEARING
(Issued November 20, 1987)

On March 11, 1987, the Commission issued an order in response to a request for a declaratory order sought by Rock Creek Limited Partnership (Rock Creek).[1] Rock Creek, the licensee for the Rock Project No. 3189, located in El Dorado County, California, had requested a ruling that the Commission has exclusive jurisdiction to set minimum flows at the project and that the California Water Resources Control Board (WRCB) has no authority to prescribe flows for the project pursuant to authority reserved to itself in a water rights permit it had issued for the project. Citing to the Supreme Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (*First Iowa*), 328 U.S. 152 (1946), we held that the establishment of minimum flows for fishery protection or other purposes at licensed projects is a matter beyond the reach of state regulation and is within the Commission's exclusive jurisdiction. However, because additional information was needed in order to establish permanent minimum flows to replace the interim minimum flows required by the license,[2] we ordered a hearing before an administrative law

[1] 38 FERC ¶ 61,240 (1987).

[2] The license was issued on a April 29, 1983. *See* 23 FERC ¶ 62,137 (1983). The license established interim minimum flows of 11 and 15 cubic feet per secod (cfs) for the project and reserved to us the right to establish permanent minimum flows at a later date.

judge (ALJ) to determine the minimum flows necessary to protect and enhance the rainbow trout population in the bypassed reach of the project, the impact on project operations and the financal and economic feasibility of the project under alternative flows, and the feasibility of alternative mitigation measures.

On April 10, 1987, WRCB moved to intervene in the proceeding for the sole purpose of contesting our finding that it had no authority to prescribe minimum flows for the project. On the same date WRCB filed a request for rehearing of our March 11, 1987 order, asserting that we had acted capriciously and unlawfully in finding that we have exclusive jurisdiction to establish minimum flows and requesting that the Commission recognize WRCB's authority to establish minimum flows for projects even when they conflict with flows specified by the Commission. For the reasons set forth below, we are denying WRCB's request for rehearing.

Background

The pre-March 11, 1987 background of this proceeding is set out in our March 11, 1987 order[3] and need not be repeated here. On March 19, 1987, WRCB adopted a final order establishing minimum flows for the project that were the same as proposed in a draft order issued by WRCB prior to our March 11, 1987 order.[4] The hearing before the ALJ took place July 14 through 16, 1987. Initial and reply briefs were filed on September 1 and 22, 1987, respectively. The ALJ has not yet issued his initial decision in the proceeding.

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[3] *See* 38 FERC at 61,772.

[4] As explained in our March 11, 1987 order (*id.*), WRCB issued a draft order on February 6, 1987, establishing 30 and 60 cfs as minimum flows for the project. These conflicted with the 11 and 15 cfs flows required in the license. *See* note 2, *supra*.

Discussion

Party Status

Ordering Paragraph (D) of our March 11, 1987 order specified that WRCB could participate in the hearing by filing a notice of intervenor status within 30 days. Although we specified in our order that the jurisdictional issue regarding minimum flows would not be considered in the hearing, WRCB indicated in its April 10, 1987 motion to intervene that it was intervening for the sole purpose of contesting our jurisdictional ruling. On April 27, 1987, Rock Creek filed an answer to WRCB's motion to intervene, opposing the motion to the extent WRCB sought to make jurisdiction an issue in the hearing. In an unreported order issued April 28, 1987, the Chief ALJ, noting that we had conferred upon WRCB the right to intervene in the hearing in our March 11, 1987 order, granted WRCB's April 10, 1987 motion to intervene in the hearing.[5] [6] Since the hearing and our March 11, 1987 order establishing the hearing are components of the same "proceeding," WRCB's status as a party to the hearing gives it the standing to challenge our March 11, 1987 order. Consequently, we will entertain its timely request for rehearing of that order.

Jurisdiction

WRCB disputes our finding that we have exclusive jurisdiction to establish minimum flows for licensed projects. WRCB asserts that Section 27 of the Federal Power Act (FPA), 16 U.S.C.

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[5] ALJs, as presiding authorities, have the authority to act on motions to intervene. *See* 18 C.F.R. § 385.504(b)(12) (1987).

[6] The California Sportfishing Protection Alliance also moved to intervene "in the proceedings" on April 2, 1987, requesting that the jurisdictional issue specifically removed from the scope of the hearing by our March 11, 1987 order be addressed in the hearing. The Chief ALJ denied the Alliance's motion to intervene in his April 28, 1987 order. The Alliance subsequently requested leave to file an interlocutory appeal of the April 28, 1987 denial pursuant to 18 C.F.R. § 385.715 (1987). This was denied by the ALJ in an unreported order issued June 12, 1987.

§ 821,[7] provides the states with the authority to control licensees' appropriation of water and hence the minimum flows for their projects and that language to the contrary appearing in *First Iowa* was *dictum*. WRCB contends that this proposition is reinforced by the legislative history of the FPA and by the Supreme Court's interpretation in *California v. United States*, 438 U.S. 645 (1978), of a similar water rights provision contained in Section 8 of the Reclamation Act of 1902.[8]

In *First Iowa*, the Commission, relying on Section 9(b) of the FPA, 16 U.S.C. § 802(b),[9] had dismissed a license application for a project to be located in Iowa because the applicant had not presented evidence of its compliance with certain Iowa statutes, including one prohibiting the construction and operation of a dam or the taking of water from a stream without a permit from the state's Executive Council, one specifying that the method of construction, operation and maintenance of dams would be subject to the approval of the state's Executive Council, and one providing that a permit could be issued upon such terms and conditions as the state's Executive Council may prescribe but only if the water taken from a stream in connection with a project were to be returned thereto at the nearest practicable point without being materially diminished in quantity or polluted or rendered deleterious to fish life. The Commission was affirmed on appeal. *See* 151 F.2d 20 (D.C. Cir. 1945).

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[7] Section 27 of the FPA provides that

> nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

[8] 32 Stat. 390.

[9] Section 9(b) requires a license applicant to submit, in pertinent part,

> [s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes . . . .

In reversing the affirmance of the Commission's dismissal of the license application, the Supreme Court held that Section 9(b) of the FPA does not require applicant compliance with state laws such as those referenced above, since they would interefere with the responsibilities vested in the Commission by the FPA and thus are preempted by Part I of the FPA. The Court stated that interpreting Section 9(b) as requiring compliance with the state statutes in question would vest a veto authority in the states. It held that "[s]uch a veto power easily could destroy the effectiveness of the Federal [Power] Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission." *First Iowa* at 164.

In reaching the above conclusion, the Court explained the interrelationship of the respective authorities of the United States and the states under the FPA as follows:

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. * * * A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.

First Iowa at 167-68.

Late in its opinion, the Court reiterated its explanation regarding the FPA's division of authority and explained the meaning of Section 27 of the FPA as follows:

Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject [footnote omitted].

Sections 27 and 9 are especially significant in this regard. Section 27 expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. • • •

• • •

The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. • • •

This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course [footnote omitted].

First Iowa at 174-76.

Thus, *First Iowa* clearly stands for the proposition that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a)[10] of the FPA are preempted. It also clearly stands for the proposition that the only

[10] Section 10(a) was redesignated Section 10(a)(1) by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495 (October 16, 1986); however, the license for Project No. 3189 was issued prior to the enactment of ECPA.

rights saved to the states by Section 27 of the FPA are property rights. In other words, the FPA does not abolish property rights in water secured under state law, and such rights cannot be taken by a Commission licensee without compensation.

As we explained in our previous order in this proceeding and in *Roseburg Resources Company and Mega Renewables* (*Roseburg*), 41 FERC ¶ 61,142 (1987), the imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process under Section 10(a). In considering and balancing all aspects of the public interest as we are required to by Section 10(a) in determining whether, and under what conditions, a license should issue,[11] we must balance, *inter alia*, the need to protect environmental interests with the need for the power to be produced by the projects. In so doing, we prescribe conditions, such as those relating to minimum flow releases, that we believe will provide the appropriate level of environmental protection and energy generation and will not issue a license if the conditions we deem necessary to protect environmental resources would render a project economically infeasible.[12]

Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by WRCB, would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state. By imposing higher minimum flows than prescribed in a license, a state could require greater environmental protection than we determined necessary and could cause a project to become economically infeasible. Conversely, by imposing lower minimum

[11] *See* Udall v. FPC, 387 U.S. 428 (1987).

[12] *See* City of Broken Bow and Redark Development Authority, 38 FERC ¶ 61,237 (1987), and cases cited therein.

flows than prescribed in a license, a state could require the operation of a project providing less environmental protection than we found necessary in issuing the license. In other words, our role as the balancer of competing public interest considerations under Section 10(a) would be vitiated if the states possessed the authority asserted by WRCB.

We believe it is clear that the authority to impose minimum flow releases resides exclusively with us, since it is an integral part of our responsibilities under Section 10(a). Thus, any authority a state may have pursuant to state law to impose minimum flow releases is preempted by Section 10(a), even if in the exercise of that authority the state does not attempt to impose minimum flow conditions drastically different from those imposed in a license. This preemption is even clearer in cases where the minimum flow conditions the state is attempting to impose would render a project economically infeasible, since such conditions would result in the *de facto* veto of the project. We believe the only way to reconcile the provisions of Section 27 of the FPA with the comprehensive planning authority vested exclusively in us by Section 10(a) is to interpret Section 27 as only protecting property rights in water as was done in *First Iowa*.

WRCB attempts to deflect *First Iowa's* interpretation of Section 27 by labeling it *"dictum."* According to WRCB, the Section 27 language was *dictum* because the only issue before the Court was whether or not Section 9(b) required compliance with Iowa law and because the Iowa law was not a traditional water rights law in that it absolutely forbade construction of dams under certain circumstances rather than regulated water use under traditional "beneficial use" standards. Finally, WRCB contends that, since the issue before the Court was whether pre-licensing compliance with state law was required and not whether the states have authority to require licensees to obtain state water rights after a license is obtained, as WRCB contends is required by Section 27, Section 27 was not applicable in that case.

WRCB reads *First Iowa* much too narrowly. While we agree that the specific action before the Court was the Commission's dismissal of a license for the purported failure of the applicant to meet the requirements of Section 9(b), the Court could not have

made its Section 9(b) holding without having addressed the meaning of Section 27. Contrary to the characterizations of WRCB, the Iowa statutes at issue in *First Iowa* did relate to the regulation of water use. The statutes gave the state's Executive Council the authority to prescribe terms and conditions in a permit to ensure that the project would return water to a stream at the nearest practicable place to where it was taken without being, *inter alia*, rendered deleterious to fish life. Also, the statutues gave the state's Executive Council the authority to approve, *inter alia*, the operation of any dam, which would presumably cover the means and timing of water use by the dam and related facilities. Thus, the statutes clearly related to the regulation of water use and provided Iowa's Executive Council with authority comparable to that which WRCB contends it can exercise in this case.

The Iowa statutes at issue in *First Iowa* related to the appropriation, diversion, and use of water as referenced in both Sections 9(b) and 27 of the FPA. In reaching its conclusion that Section 9(b) did not require compliance with the Iowa statutes at issue, the Court had to construe Section 27 as only saving state laws relating to property rights in water. In other words, if the Court had interpreted Section 27 as does WRCB, it could not have made its Section 9(b) determination, since the laws saved under such an interpretation of Section 27 would be equivalent to the ones the Court found the license applicant did not have to demonstrate compliance with under Section 9(b). Thus, the Court's discussion of the reach of Section 27 was necessarily interwined with its Section 9(b) conclusion and therefore cannot be considered *dictum*.

Finally, WRCB's attempt to distinguish the Court's Section 27 discussion on the basis of pre- versus post-licensing application is unpersuasive. Although the specific action appealed in *First Iowa* was the Commission's dismissal of a license application for failure to demonstrate compliance with Iowa statutes, the Court made clear that compliance with the statutes was not required at any point in time.[13]

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[13] *See, e.g.*, the Court's statement (328 U.S. at 166) that "[i]f a state permit is not required, there is no justification for requiring the peti-

Although we believe that the *First Iowa* Court's discussion of Section 27 was not *dictum* and hence controls the present case, we note that in *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), the Court, in response to the Commission's contention that sums paid by a licensee for the right to use water for power purposes were not to be included in calculating the licensee's amortization reserve liability under Section 10(d) of the FPA, 16 U.S.C. § 803(d), because pre-existing water rights were abolished by the FPA, held that such rights survive until taken over by purchase or otherwise and stated that *First Iowa's* language regarding Section 27 was applicable to proprietary water rights for power purposes as well as those for other proprietary uses.[14] Thus, the Court itself has followed its interpretation in *First Iowa* that Section 27 is intended to protect property rights in water acquired pursuant to state law.

The United States Circuit Courts of Appeals have also interpreted the FPA as not requiring compliance with state water use or regulation statutes. In *State of Washington, Department of Game v. Federal Power Commission*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954), the court, relying on *First Iowa*, and without reference to Section 27, held that a license applicant did not have to show compliance with the laws of the State of Washington, including a statute requiring it to obtain a permit for the diversion of water, prior to obtaining a Commission license, and that state laws cannot prevent the Commission from issuing a license or bar a licensee from acting under its license to build a dam on a navigable stream. In *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165 (9th Cir. 1964), the court stated that the "only purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another, of a license

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tioner, as a condition of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a state permit."

[14] *See* 347 U.S. at 256. *See also* Ford & Son v. Little Falls Co., 280 U.S. 369 (1930).

granted by the Commission,"[15] and held that Section 27 did not stand in the way of the Commission imposing navigation conditions in a license that could interfere with the licensee's retention and exercise of its state-granted water rights.[16] In *State of California v. Federal Power Commission*, 345 F.2d 917, 923 (9th Cir. 1965), the court applied the Section 27 rationale of the previously-cited case to conclude that the Commission had authority to impose conditions under Section 10(a) of the FPA which could impair a licensee's full use of irrigation water rights in future years. Finally, in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 478 (2nd Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), the court held that Section 27 was not intended to give entities the power to veto Commission action. Thus, the circuit courts either implicitly or explicitly have given Section 27 the same interpretation as afforded it by the Supreme Court.

WRCB's contention that the legislative history of the FPA supports its interpretation of Section 27 is unpersuasive. First, the Court in *First Iowa* specifically considered the portion of the Congressional *Record* where the statements referenced by WRCB appear and found that the legislative debate "further emphasized the purely proprietary sense in which this language was used."[17] Second, we believe the statements quoted by WRCB merely support the interpretation given to Section 27 by the Court in *First Iowa*, that the right to divert and use water resides in the states and that, if a Commission licensee takes such a right, it must compensate the owners of the right. In other words, a license does not abrogate those rights; rather, the license effectuates the "admittedly superior right of the Federal Government . . . to regulate interstate and foreign commerce,"[18] so long as compensation is made for water rights taken.

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[15] 328 F.2d at 176.

[16] 328 F.2d at 177.

[17] *First Iowa* note 20 at 176-77.

[18] *First Iowa* at 171.

WRCB's contention that the Court's decision in *California* supports its position is also unpersuasive. The Court held in that case that, because of Section 8 of the Reclamation Act of 1902,[19] the Bureau of Reclamation would have to appropriate, purchase, or condemn water rights necessary for its water project in conformity with state law and that state conditions on these water rights were valid so long as they were not inconsistent with Congressional directives concerning the dam. Although the Court in *First Iowa*, some of the legislative history cited to by WRCB, and two of the circuit court decisions referenced previously[20] indicated that Section 27 of the FPA was based in part on Section 8 of the Reclamation Act of 1902, the Court's decision in *California* regarding the effect of Section 8 does not lead to the conclusion that states have the right to prescribe minimum flow or other conditions on licenses under Section 27 of the FPA.

The Reclamation Act of 1902 does not vest comprehensive planning responsibilities in the Bureau of Reclamation; rather, the Bureau of Reclamation is charged with the responsibility of developing reclamation projects pursuant to specific Congressional directives relative to each project. Thus, the Court in *California* did not have to address a potential conflict between state requirements and project conditions developed through an agency comprehensive planning process mandated by statute. In contrast, and as we explain herein and in *Roseburg*, Part I of the FPA gives the Commission a comprehensive planning role with respect to hydro-electric development on Commerce Clause waters. Consequently, state requirements with respect to minimum flow and other provisions which deal with subjects falling within the Commission's comprehensive planning under Part I of the

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[19] Section 8 of the Reclamation Act of 1902 provides, in pertinent part, that

> nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

[20] *Portland General Electric* and *Scenic Hudson*, *supra*.

FPA clearly conflict with the Congressional directive of the FPA that we exercise these comprehensive planning responsibilities. Thus, such requirements are preempted by Part I of the FPA. Consequently, interpreting Section 27 of the FPA as not granting WRCB the authority to prescribe minimum flows for Project No. 3189 is consistent with the Court's opinion in *California*. Also, as discussed in *Roseburg*, the continued vitality of *First Iowa* was recently adverted to by the Court in *Pacific Gas & Electric Co. v. Energy Resources Commission (PG&E)*, 461 U.S. 190, 223 note 34 (1983).[21]

Finally, and as indicated previously,[22] the license for Project No. 3189 was issued prior to the enactment of ECPA; therefore, the changes made to the FPA by ECPA are not applicable to Project No. 3189. However, we believe that two of the amendments made to the FPA by ECPA reinforce our interpretation of Section 27 as not vesting in the states the authority to set minimum flow releases for licensed projects.

First, Section 3(a) of ECPA amended Section 4(e) of the FPA to make explicit that in issuing licenses we are to give "equal consideration" to the purposes of energy conservation, the protection, mitigation, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality in addition to the power and development purposes for which licenses are issued. If the states were permitted to specify the minimum flow releases for projects under WRCB's interpretation of Section 27, we would be unable to carry out our obligation to give equal consideration to all of the values set out in amended Section 4(e), since the states, by having the ability to impose conditions different from those

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[21] WRCB acknowledges the existence of *PG&E* but dismisses it as providing "little illumination concerning the issues arising here." WRCB petition at 24, note 3. While WRCB correctly points out that Section 27 was not an issue in *PG&E*, the Court clearly underscored the decisional significance of the Commission's comprehensive planning responsibilities under the FPA in the preemption context.

[22] *See* note 10, *supra*.

included in licenses, could negate the set of conditions imposed by us to effectuate our equal consideration of these values.

Second, Section 3(c) of ECPA added a new subsection (j) to Section 10 of the FPA requiring us to include license conditions based on the recommendations of federal and state fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife. However, although Section 10(j) requires the Commission to give due weight to the expertise of such agencies, Section 10(j) does not vest a veto authority over licenses in such agencies, and the ultimate authority to decide if, and under what conditions, a license should issue resides with the Commission under Sections 4(e) and 10(a)(1) of the FPA.[23] We believe that it would be incongruous to argue that, although a state fish and wildlife agency has no authority to prescribe mandatory conditions in licenses for fish and wildlife through Section 10(j), a state water resources agency such as WRCB has the authority to impose minimum flow release requirements for fishery purposes such as those involved in this case under the guise of water rights law pursuant to Section 27 of the FPA.

The Commission orders:

The request for rehearing filed on April 10, 1987, by the California Water Resources Control Board is denied.

By the Commission.

(SEAL)

/s/ LOIS D. CASHELL

Lois D. Cashell,
Acting Secretary.

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[23] *See* H.R. REP. NO. 99-934, 99th Cong., 2nd Sess. at 23-24 (1986).

Supreme Court, U.S.
FILED
NOV 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION and ROCK CREEK LIMITED PARTNERSHIP,

Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court should now overrule its decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), that the effect of section 27 of the Federal Power Act is limited to "the control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature*." (Italics added.)

Or, to put the same question in more general terms:

2. Whether the savings provision of section 27 of the Federal Power Act (which the Court's decisions make clear relates only to protection of state-conferred water rights from uncompensated takings) permits a state to regulate the manner of operation of a federally licensed hydropower project located on a non-navigable stream on federal land, where all water is returned to the stream and no other water user's rights are affected.

PARTIES

The petitioner is the State of California, acting on behalf of the State Water Resources Control Board.

The respondents are the Federal Energy Regulatory Commission and the Rock Creek Limited Partnership.[1]

[1] The limited partners of Rock Creek Limited Partnership are Olympe Inc., Motherlode Hydro, Inc., and Cal Hydro Electric Power Co., all California corporations. The general partner of Rock Creek Limited Partnership is El Dorado Hydro, a general partnership of the above three corporations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-333

STATE OF CALIFORNIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION and
ROCK CREEK LIMITED PARTNERSHIP,
Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 877 F.2d 743 (9th Cir. 1989). That opinion affirmed the Federal Energy Regulatory Commission's Order in Response to Request for Declaratory Order and Providing for Hearing, reported at 38 F.E.R.C. ¶ 61,240 (1987), and its Order Denying Rehearing, reported at 41 F.E.R.C. ¶ 61,198 (1987).

STATEMENT

1. Nature of the Controversy.

The Rock Creek Hydroelectric Project (the "Project") is a small-scale hydroelectric power plant located on Rock Creek, a small, non-navigable tributary of the South Fork of the American River, in El Dorado County, California. The Project does not have significant water storage capacity, but instead produces electricity by diverting water from the creek through a man-made tunnel to a powerhouse, where the water drives turbines that generate electricity. The water is returned to Rock Creek at its confluence with the South Fork of the American River, approximately 5,100 feet downstream from the point of diversion. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,117-18 (1987).

Both the Project and the creek are located entirely on federally owned land administered by the Bureau of Land Management, except for a small portion owned by the Partnership. Order Issuing License (Major), 23 F.E.R.C. ¶ 62,137, at 63,203 (1983) ("FERC License"); Order WR 87-2, at 47-48 (Cal. St. Water Res. Control Bd. Mar. 19, 1987). By virtue of its FERC License, the Project is entitled to use "all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project." FERC License, 23 F.E.R.C. at 63,204. Accordingly, the Project's operation does not affect the water rights of others. As even the State Board has conceded in related litigation:

> The State Water Board is not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.

Stipulation of Facts ¶ 17, *Rock Creek Limited Partnership v. State Water Resources Control Bd.* (E.D. Cal. No. S-87-523).

2. Grounds for Issuance of the FERC License.

In reviewing the June 1, 1982 license application for the Project, the Federal Energy Regulatory Commission ("FERC") considered the need for, and benefits to be derived from, the Project, the Project's economic feasibility, and the Project's potential environmental impact. *See* FERC License, *passim*. On April 29, 1983, FERC approved the Project and issued the License. *Id.*

In accordance with the statutory mandate of section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), FERC considered the "bypass flow"[2] levels that would be appropriate for the purpose of protecting the trout fishery in Rock Creek. FERC License at 63,201. Based upon its review of all available information, FERC concluded that "factors other than the quantity of available adult habitat" in Rock Creek "are limiting fish production," and that "the release of the minimum flows on an interim basis as proposed by [the licensee] would not adversely impact the fishery resources of Rock Creek." *Id.* Accordingly, FERC ordered that, until completion of a comprehensive

[2] The "bypass flow" is the water flow that is not diverted from the creek for power generation but instead is left in the portion of the creek between the point of diversion and the point of return.

fishery study, the Project "shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule . . .: May through September - 11 cubic feet per second (cfs) and October through April - 15 cfs." *Id.*, Article 37, at 63,204. In February 1984, approximately a year after the License was issued, the State Board issued the Project a permit to appropriate water incorporating identical bypass flows.

3. The Challenged FERC Rulings.

Although the State Board originally conformed its permit to the terms of the FERC License, in 1986 it convened hearings on whether the Project's state permit should be amended to raise substantially the bypass flow under which the Project must operate. In response, the Partnership petitioned FERC for a declaratory order resolving which requirements, state or federal, would prevail. On March 11, 1987, FERC ruled in response to the Partnership's petition that "the establishment of minimum flows is a matter beyond the reach of state regulation," 38 F.E.R.C. ¶ 61,240, at 61,773 (1987), that the flows stated in the FERC License prevailed over state requirements "irrespective of any action taken by [the State Board]" and that the "Rock Creek Limited Partnership shall release the flows specified in Article 37 of its [FERC License] until otherwise ordered by the Commission." *Id.* at 61,773, 61,774. In the same ruling, FERC also scheduled hearings to allow the State Board and other interested parties to present evidence as to whether FERC should increase the Project's bypass flows.[3]

[3] At those hearings, held later in 1987, California urged that the bypass flows be raised to 60 cfs in winter months and 30 cfs in summer. On November 16, 1987, the FERC administrative law judge issued an initial decision that the bypass flow should be raised to 20 cfs year round. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,122 (1987). All parties have filed exceptions to that ruling, which remain under submission with FERC pending action on California's instant petition.

REASONS FOR DENYING THE WRIT

I. THE COURT HAS ALREADY DECIDED THE ISSUE INVOLVED.

The question raised here by the State of California has already been decided authoritatively by this Court, first in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and then nine years later in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

First Iowa involved a proposed hydropower project that would divert water from the Cedar River at Moscow, Iowa, transport that water by canal eight miles to Muscatine, Iowa, on the Mississippi River, and there generate electricity as the water fell 101 feet to the level of the Mississippi. 328 U.S. at 157-58. In the process, the project would leave only 25 cfs of water in the Cedar River from Moscow downstream 29 miles to the Cedar River's confluence with the Iowa River. Iowa claimed this would hinder navigation and harm the river's fishery.[4] The project would

[4] 328 U.S. at 158-59. According to the State of Iowa, this diversion would result in "an absolute destruction of navigation or commerce" on the Cedar River, would "undoubtedly create a health hazard and nuisance," would "destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted," would inundate three United States highways and one state primary highway, and would make the lower

violate the terms of a state statute requiring that a permit be obtained and that "any water taken from the stream in connection with the project [must be] returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life." 328 U.S. at 164-66, 170 (emphasis omitted). The Federal Power Commission (FERC's predecessor) dismissed the developer's application for a license based upon failure to comply with section 9(b) of the Federal Power Act, 16 U.S.C. § 802(a)(2), which required submission of "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes." Although the Commission was of the opinion that the Iowa statute was preempted, *see* 328 U.S. at 161, it dismissed the case, ruling that the validity of the statute should be determined in the courts before it acted on the license application. *Id.* at 161-62.

This Court reversed the dismissal in an opinion which it characterized as "illustrat[ing] the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act." *First Iowa*, 328 U.S. at 156. The Court determined that the dismissal of the application under section 9(b) for failure to present satisfactory evidence of compliance with the Iowa statute was proper only if the statute

portion of the Cedar River "a dry run." Brief for State of Iowa, Intervenor at 4; Petition for Rehearing by State of Iowa, Intervenor at 5.

were valid. *Id.* at 166-67. Turning to the validity of the Iowa statute, the Court stated:

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. . . . Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. . . .

Id. at 167-68. Thus, *First Iowa* made clear that the Act preempted all state regulation on those subjects which the Act placed under the regulatory authority of the Federal Power Commission, now FERC.[5]

[5] California argues in its petition that the legislative history of section 27 of the Federal Power Act leads to the conclusion that state water laws apply to federally licensed hydropower projects. That argument was extensively, and unsuccessfully, briefed by Iowa in *First Iowa*. Brief for State of Iowa, Intervenor, at 23-28; Petition for Rehearing by State of Iowa, Intervenor, at 17-21; Brief for First Iowa Hydro-Electric Cooperative, Petitioner at 11, 19 n.8, 22-24 & n.10, 31-35, app. 18-36 (reprinting excerpts from master's thesis of R.B. Snapp on legislative history of Federal Power Act), app. 37-45 (reprinting portions of legislative history); Brief for the Federal Power Commission, Respondent at 19-20, 38-39 n.23, 40 n.25, 48-50; *see also* Reply Brief for First Iowa Hydro-Electric Cooperative at 14-17 (apps. B-D). This Court concluded, however, that the legislative history supports the view that states cannot regulate the operations of projects licensed under the Federal Power Act and that the effect of section 27 is limited to state laws concerning proprietary rights to use water for irrigation, municipal, and similar uses. 328 U.S. at 173-74 (quoting Rep-

This Court then addressed and rejected Iowa's contention that section 27 of the Act preserved its right to regulate a federally licensed hydropower project:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

328 U.S. at 175-76.

California's characterization of *First Iowa*'s interpretation of section 27 as dictum is unwarranted. As noted above, the Court's finding that the Iowa statute was preempted was necessary to the decision: if the statute had been valid the Commission would have acted properly in insisting on satisfactory evidence of compliance under section 9(b). The issue of preemption was one of the Questions Presented in both the

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resentative LaFollette), 176-77 n.20 (discussing legislative history of Section 27), 179-81 & n.23. The petitioner's argument is no more availing in its repetition here.

project developer's petition[6] and Iowa's opposition.[7] Indeed, had the *First Iowa* case been concerned only with the "informational" effect of section 9(b), as California argues, the case would have involved nothing more than the Commission's refusal to license a hydropower project that never could operate legally. It is difficult to understand how such a refusal could constitute an abuse of discretion, much less give rise to an "important question of federal law" warranting review by the Court.

Federal jurisdiction in *First Iowa* was based on the navigability of the Cedar River. Nine years later, in *Federal Power Commission v. Oregon*, 349 U.S. 435, 437-38 (1955), the Court applied its *First Iowa* construction of section 27 to a project which, like the Rock Creek Project, was located on a non-navigable stream on federal land. 16 U.S.C. §§ 797(e), 817. There, Oregon challenged the Federal Power Commission's issuance of a license to a private developer for construction of a hydropower project on the Deschutes River in Oregon. The State contended that the license conditions did not provide adequate protection for breeding fish. 349 U.S. at 437. Relying on *First Iowa*, the Court again found exclusive federal authority to regulate federally licensed hydropower projects, saving state law from preemption only to the extent necessary to protect the vested water rights

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[6] Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 4 (question 6). *See also id.* at 2-5 (questions 1-4, 10, and 11).

[7] Intervenor's Resistance to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 3 (question 4); *see also* Brief for the Federal Power Commission, Respondent at 3 (question 3).

of others. *Id.* at 441-46. In the Court's view, there was

> no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, *provided that, as required by the Act, the use of the water does not conflict with vested rights of others.*

Id. at 444-45 (citing section 27) (emphasis added). Relying on section 27 and without even citing section 9(b), the Court invalidated Oregon's fishery protection measures:

> To allow Oregon to veto such use [of water by the project], by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision. No such duplication of authority is called for by the Act.

349 U.S. at 445 (citations to *First Iowa* omitted).

II. *FIRST IOWA* AND *FEDERAL POWER COMMISSION v. OREGON* ARE NEITHER IN CONFLICT WITH NOR OVERRULED BY *CALIFORNIA v. UNITED STATES.*

Apparently recognizing that the Ninth Circuit's ruling in this case was mandated by *First Iowa* and *Federal Power Commission v. Oregon*, California argues that the doctrine of those cases has been silently overruled by *California v. United States*, 438 U.S. 645 (1978). *California*, however, involved the preemptive effect of a *different statute* with a *markedly different purpose and structure* and a savings provision with *substantially different wording*. The cases are not in conflict, but simply illustrate that different statutes can have different preemptive effects.

California v. United States involved the preemptive effect of the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.*, not the Federal Power Act. The different purposes of the two acts can be seen clearly by comparing the Court's opinions in *California* and *First Iowa*. As the Court noted in *California*, the Reclamation Act did not impose a broad federal regulatory scheme, but instead "merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended." 438 U.S. at 651. In contrast, the Court in *First Iowa* characterized the Federal Power Act as designed "to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." 328 U.S. at 180. In view of these clearly different statutory purposes, it is not surprising that the Reclamation Act has a narrow preemptive effect while the Federal Power Act is broadly preemptive.

California argues that the similarity in wording of the savings provisions of section 8 of the Reclamation Act and section 27 of the Federal Power Act dictates that they be construed identically. The similarity, however, focuses on one common clause, upon which the remainder of the two provisions place substantially different limitations.

The Reclamation Act was designed to provide federal funding of irrigation projects in the arid West. *See California v. United States*, 438 U.S. at 664. The Federal Power Act, on the other hand, was designed to promote hydropower development through the efforts of thousands of licensees under supervision of a federal agency. It gives FERC broad authority per-

vasively to regulate the construction and operation of hydropower projects. By sharp contrast, the Reclamation Act's savings provision, section 8, specifically preserves state authority with respect to irrigation, the central subject of the Act. It also expressly states that in carrying out the provisions of the Act, the "Secretary of the Interior . . . shall proceed in conformity with such [state] laws." 43 U.S.C. § 383. While sharing some common language with section 8, section 27 does not purport to preserve state laws concerning the very purpose of the Act (hydropower development) and contains no analogue to section 8's command that federal actions be conformed to state requirements. In its entirety, section 27 states:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821.

Notably absent from section 27 is any mention of state laws concerning water used for hydropower generation or any parallel to section 8's requirement that the provisions of the Reclamation Act shall be carried out "in conformity with such [state] laws." 43 U.S.C. § 383. Had Congress intended to subordinate the Act's comprehensive regulation of hydropower projects to state laws concerning use of water by such projects, "the simple thing would have been to so provide." *First Iowa*, 328 U.S. at 178-79.[8]

[8] Differing constructions in different contexts of water law savings clauses is neither novel nor anomalous. Instead, it is a longstanding and well-accepted phenomenon that reflects the fact that savings provisions were used in several different acts with markedly different purposes. For instance, twelve years before *First Iowa*, the Court interpreted the Desert Land Act's savings provision, 43 U.S.C. § 321, as having a broad effect in saving state water laws from preemption. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155-58 (1935). In *First Iowa*, the Supreme Court gave section 27 of the Federal Power Act, which contains the same phrase as that of the section involved in *California Oregon*, a narrow construction without even citing *California Oregon*. Thirty-two years later, in *California v. United States*, the Court gave section 8 of the Reclamation Act a broad construction without citing *First Iowa*.

If further evidence were necessary to establish that *California v. United States* was not meant to overrule *First Iowa*, it is supplied by the Court's continued citation of *First Iowa* since the *California* decision. *E.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982). Accordingly, post-*California v. United States* decisions have made clear that *First Iowa* remains valid and that there is no conflict in federal law which would warrant the Court's review of this case.

III. CONGRESS HAS REFUSED TO CHANGE THE *FIRST IOWA* RULE.

The interpretation of the Federal Power Act first announced by this Court in *First Iowa* has been uniformly followed in the ensuing years. Courts, the Commission, and hydropower project operators all have proceeded on the basis that the Commission's

requirements as to project operation are authoritative. Indeed, the *First Iowa* rule forms the legal foundation upon which hundreds of projects have been constructed.

Consistent with the Supreme Court authority just cited, lower court adherence to the *First Iowa* rule has been frequent, long-continued and uniform. Thus, in *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165, 176 (9th Cir. 1964), the Ninth Circuit held that section 27 is limited to preserving a right to compensation where state-conferred rights are taken by a licensee under the Federal Power Act.[9] The Second Circuit has followed suit in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 478 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).[10] District courts also have followed *First Iowa*'s lead. *See, e.g., Mega Renewables v. County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986); *Town of Springfield, Vt. v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Town of Springfield, Vt. v. Vermont Env'tl Bd.*, 521 F. Supp. 243, 248-49 (D. Vt. 1981). Thus, the Ninth Circuit's decision in this case is clearly in

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[9] *See also Public Util. Dist. No. 1 v. City of Seattle*, 382 F.2d 666, 670 n.6 (9th Cir. 1967), *cert. dismissed*, 396 U.S. 803 (1969); *Washington Dept. of Game v. Federal Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954); *United States v. Central Stockholders' Corp.*, 52 F.2d 322, 330-32 (9th Cir. 1931) (section 21 of the Federal Power Act, 16 U.S.C. § 814, gives licensees the power of condemnation).

[10] *See also Board of Elec. Light Comm'rs of Burlington v. McCarren*, 725 F.2d 176, 178 (2nd Cir. 1983).

accord with settled law and the expectations of federal licensees under the Act.

In view of the long-established adherence to the *First Iowa* rule, any change should come from Congress rather than the Court. Where a question of statutory interpretation is presented, the doctrine of *stare decisis* has special force. *Patterson v. McLean Credit Union*, 491 U.S. ___, 109 S. Ct. 2363, 2370 (1989). In 1986, Congress considered the issue of state jurisdiction over federally licensed hydropower projects in connection with the Electric Consumer Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495 (Oct. 16, 1986). Prior to the passage of the Senate version of the ECPA, hearings were held by the Senate Committee on Energy and Natural Resources concerning the possible amendment of the Federal Power Act to vest in the states control over the appropriation, diversion and use of water by federally licensed projects. *See generally* 99 Cong. Rec. S4448-49 (April 17, 1986). Despite those hearings, no such amendments were made to the ECPA by the Committee or by the House or Senate. Instead, Congress merely amended sections 4 and 10 of the Federal Power Act to require FERC to consider recommendations submitted by state fish and wildlife agencies regarding pending license applications.

IV. THE FACTS OF THIS CASE DO NOT PRESENT THE BROAD WATER RIGHTS ISSUES DISCUSSED IN THE PETITION.

California attempts to cast this case as a "water rights" case, Pet. at 21-23. On its facts, though, this case does not involve any issue of water rights. The Partnership, as private landowner and licensee of the United States, holds the riparian rights over the en-

tire section of the creek affected by the Project's operation. No upstream or downstream water rights holder is in any way affected. Nor does California law recognize any water right of a non-riparian owner for the maintenance of natural stream flows. *See Fullerton v. State Water Resources Control Bd.*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979). Thus, as in *First Iowa*, 328 U.S. at 158, the only water rights at stake are those held, through ownership or license, by the Project developer. The only issue raised by the facts of this case is whether the State Board may add a regulatory layer to that of FERC.

Where state-conferred water rights *are* involved, the developer of a hydropower project must secure those rights by purchase or condemnation. As the Court stated in *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369, 377, 379 (1930), the Federal Power Act "does not purport to authorize a licensee of the Commission to impair [water] rights recognized by state law without compensation." *Accord, Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251-55 (1954). *Cf. Portland General Elec. Co. v. Federal Power Comm'n*, 328 F.2d 165, 176 (9th Cir. 1964) (section 27's only purpose is to ensure compensation for state-conferred water rights taken by federal licensees). This case does not involve the impairment of state water rights as claimed by California, but instead involves an attempt by the State Board to go beyond protection of water rights into the realm of hydropower project regulation. As the Court recognized in *First Iowa*, Congress has reserved that realm to FERC.

CONCLUSION

For the reasons set forth above, California's petition for certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether Section 27 of the Federal Power Act, 16 U.S.C. 821, reserves to the States the power to impose requirements on a hydroelectric project that are more stringent than those specified in a license issued by the Federal Regulatory Energy Commission.

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H.R. Rep. No. 934, 99th Cong., 2d Sess. (1986) 21-22

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-333

STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 877 F.2d 743. The pertinent orders of the Federal Energy Regulatory Commission (Pet. App. A4-A22, A23-A36) are reported at 38 F.E.R.C. ¶ 61,240 and 41 F.E.R.C. ¶ 61,198.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1989. The petition for a writ of certiorari was filed on August 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), empowers the Federal Energy Regulatory Commission, *inter alia*, to "issue licenses * * * for the purpose of constructing, operating, and maintaining" hydroelectric projects "necessary or convenient for * * * the development, transmission, and utilization of power across, along, from, or in any streams or other bodies of water" that are subject to Congress's regulation under the Commerce Clause. Section 10 of the Act, 16 U.S.C. 803, establishes various conditions that must be included in any such license, and permits the Commission to impose other conditions not inconsistent with the provisions of the Act. At the time when the license in this case was issued, the Act required, as one condition to any license, that the project be "such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes." 16 U.S.C. 803(a) (1982).

In keeping with this "comprehensive" responsibility, the Commission's regulations have long required license applications to provide information on a variety of subject matters—including an "Environmental Report." Under the regulations in effect at the time that the application in this case was filed, for projects of the type at issue, an environmental report was required to contain a description of (i) "the environmental setting of the project, including * * * fish and wildlife resources;" (ii) a description of "the expected environmental impacts from proposed construction or development and the proposed operation of the power project * * * and an explanation of the specific measures proposed by the applicant, [federal, state, and local] agencies, and others to protect and enhance environmental resources and values and to mitigate adverse impacts of the project on such resources," together with an explanation of the applicant's "reasons for not undertaking any measures proposed by any agency consulted;" and (iii) a description of "the steps taken by the applicant in consulting with Federal, state, and local agencies with expertise in environmental matters." 18 C.F.R. 4.61 (d)(2)(i)-(iii) (1982).[1]

b. With the passage of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (the ECPA), Congress amended the Federal Power Act to clarify and enhance the Commission's responsibility to weigh the effect of hydroelectric projects on the environment, including fish and wildlife. "In deciding whether to issue any license," the Commission is now obligated "in addition to the power and development purposes for which licenses are is-

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[1] The cited regulation applied to "minor projects" and "major projects" whose generating capacity did not exceed 5 megawatts. See 18 C.F.R. 4.60 (1982). More detailed studies were required for "major projects" whose capacity exceeded 5 megawatts. 18 C.F.R. 4.41(f) (1982). Specifically, such an application was required to include a *"Report on Fish, Wildlife, and Botanical Resources"* containing considerable detail on those subjects. 18 C.F.R. 4.41(f)(3) (1982).

The regulations prescribing the contents of applications for major and minor projects have changed since 1982, but all versions have required the applicant to provide information on the environmental consequences of a project, including potential effects on fish and wildlife.

sued, * * * [to] give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat) and protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. 797(e). Each license must now include conditions for the protection and enhancement of fish and wildlife affected by the project. 16 U.S.C. 803(j)(1). The Commission must base such conditions on recommendations from federal and state fish and wildlife agencies. When the Commission finds that any such recommendation would be inconsistent with the purposes of the Act, it is required to attempt to resolve the inconsistency with the agencies involved, giving due weight to their expertise, and, failing that, to make express findings regarding the basis for departing from the recommendation. 16 U.S.C. 803(j)(1) and (2).

c. Against this background, Section 27 of the Act, 16 U.S.C. 821, protects specified types of state laws from preemption. It provides that nothing in the Act:

> shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The question presented by this case is whether, in light of the Commission's comprehensive authority to consider and provide for the environmental consequences of hydroelectric projects in its licensing determinations, Section 27 nevertheless reserves to States the power to limit for environmental purposes the quantity of water that may be diverted to a licensed hydropower project.

2. The project at issue here is a 3,000-kilowatt hydropower facility located on Rock Creek, a tributary of the South Fork of the America River of California. Licensed by the Commission in 1983, and completed in the spring of 1986, the Rock Creek facility is a diversion project that withdraws water from Rock Creek to run power turbines, and returns the water to the America River approximately a mile downstream. The affected stretch lies entirely within federal public lands. As a condition of the license, the Commission required the project to maintain interim "minimum flow rates" within this one-mile stretch of 11 cubic feet per second (cfs) from May through September and 15 cfs from October through April. The purpose of this condition was to protect the creek's fish population. The license also required the project operator, the Rock Creek Limited Partnership, to conduct studies in conjunction with the California Department of Fish and Game to enable FERC to set long-term minimum flow rates. Pet. App. A2-A3.

The partnership concurrently applied for, and in February 1984 was issued, a state water use permit. The permit set interim minimum flow rates at the same levels prescribed by FERC, and also required the partnership to conduct studies with the relevant state agencies to enable the State to set its long-term minimum flow rates. In March 1987, after the project had been completed, the state authorities amended the state permit by setting long-term minimum flow rates higher than those established in the FERC proceeding—rates of 60 cfs from March through June and 30 cfs from July through February. The effect of this new limitation was to allow the partnership to divert significantly less water from Rock Creek than the FERC license permitted. See Pet. App. A3-A4; Pet. 3.

3. In the meantime, the partnership petitioned FERC for an order that the Commission had exclusive jurisdiction to establish long-term minimum flow rates. In submissions to the Commission, the partnership argued that compliance with the 30 cfs and 60 cfs requirements that California authorities were proposing would render the project economically infeasible. Pet. App. A16-A17.

In March 1987, the Commission issued a declaratory order holding that the State "has no authority to set minimum flows for the project that conflict with those contained in the [FERC] license" and that the partnership "must comply" with FERC's flow rates "until otherwise ordered by the Commission, irrespective of any action taken by [the state water authority]." Pet. App. A18.[2] The Commission explained that "[t]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process" under the Federal Power Act and that, "[a]s such, the establishment of minimum flows is a matter beyond the reach of

[2] At the same time, the Commission ordered hearings to be held to fix long-term minimum flow rates for the project. Pet. App. A22. Those hearings were held in July 1987 before an administrative law judge; the ALJ's subsequent opinion, *Rock Creek Limited Partnership*, 41 F.E.R.C. ¶ 63,019 (Nov. 16, 1987), recommended minimum flow rates which were more stringent than the FERC set interim flow rates, but less stringent than the State's final rates. An appeal from the ALJ's decision is currently pending before the Commission.

In connection with proceedings before the Commission to fix its long-term minimum flow rates, California authorities filed comments recommending that the Commission fix rates at the levels ultimately prescribed by the state permit for the project. Pet. App. A15-A16.

state regulation." "Allowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing," the Commission continued, "and would essentially vest a veto authority over projects in the states." *Id.* at A17-A18. Quoting from this Court's decision in *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 164 (1946), the Commission concluded that "[s]uch a veto power easily could destroy the effectiveness of the Federal Act," since "[i]t would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgement of the Federal Power Commission." Pet. App. A18.

Petitioner sought leave to intervene in the proceeding and filed a request for rehearing of the Commission's declaratory order. The Commission granted leave to intervene but denied rehearing. Pet. App. A23-A36. The Commission reviewed this Court's decision in *First Iowa* at length, and concluded that the decision "clearly stands for the proposition that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a) of the FPA are preempted." *Id.* at A28. The Commission reiterated that "the imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process," and that interpreting Section 27 to allow States to prescribe minimum flow releases would render the Commission's comprehensive planning and responsibility "meaningless." *Id.* at A29.[3] The Commission rejected

[3] The Commission noted that its licenses prescribe conditions, such as those relating to minimum flow releases, that it believes will provide the appropriate level of environmental

the State's argument that the Court's interpretation of Section 27 in *First Iowa* was dictum that had been overruled *sub silentio* in *California* v. *United States*, 438 U.S. 645 (1978). Pet. App. A30-A31, A34.

Finally, although it noted that the 1986 amendments to the Federal Power Act postdated the licensing determination at issue here, the Commission found that those amendments "reinforced [its] interpretation of Section 27." Pet. App. A35. It explained that if States were permitted to specify minimum flow rates for projects, the Commission could not "carry out [its] obligation to give equal consideration to all of the values" referred to in Section 4(e) of the Act (see pp. 3-4, *supra*), since States could "negate the set of conditions imposed by [the Commission] to effectuate [its] equal consideration of these values." Pet. App. A35-A36. It would also be "incongruous," the Commission continued, if state agencies that must be consulted under Section 10(j) of the amended Act, 16 U.S.C. 803(j)—but have no authority to prescribe license conditions protecting fish and wildlife—could nevertheless impose minimum flow requirements under state law. Pet. App. A36.

4. California petitioned for review, and the court of appeals affirmed. Pet. App. A1-A13. Examining

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protection and energy generation, and that it will not issue a license if conditions necessary to protect environmental resources would render a project economically infeasible. The Commission explained the effect that the State's interpretation of Section 27 would have on those determinations (Pet. App. A29):

> After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state.

the Federal Power Act "as a whole," the court of appeals reviewed the statutory provisions giving the Commission authority to oversee hydropower development; the court concluded that "[t]he weight of the comprehensive planning authority and the individual powers assigned to support that authority falls quite heavily on the side of federal exclusivity." *Id.* at A7-A8.

Turning to Section 27, the court observed that the provision could support "two conflicting readings"—one under which state authority was limited "to the area of property rights involving water for irrigation, municipal use, and related activities" and another under which the States would have "final authority over all issues connected to the control and use of water by a project licensed under the FPA." Pet. App. A8-A9. The court determined that the *First Iowa* decision required it to adopt the first of these interpretations. After an extensive review of that decision, the court of appeals concluded that *First Iowa*'s "reading of section 27 and the FPA as a whole teaches that Congress intended federal law to preempt state regulation in all aspects of hydropower projects save for the limited proprietary exceptions specified in [Section 27]." *Id.* at A11. Like the Commission, the court of appeals also found "unconvincing" petitioner's argument that *California* v. *United States*, *supra*, had overruled *First Iowa*'s interpretation of Section 27. The court observed that "[a] more reasonable interpretation of *First Iowa* and *California* is that they address two different and entirely separate water use programs." Pet. App. A12.

Finally, the court of appeals rejected petitioner's argument that the state minimum flow requirements did not amount to a "veto" of the Rock Creek project.

It explained that "[c]hanging the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project. It would, in essence, create a different type of hydropower project from the one described in the license." Pet. App. A12.[4]

ARGUMENT

Over forty years ago, in *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 180 (1946), this Court recognized that the Federal Power Act grew out of efforts "to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." To that end, the Act established "a dual system of control" over hydropower projects, under which state and federal agencies would have final authority in their own jurisdictions, rather than "a dual system of futile duplication of two authorities over the same subject matter." *Id.* at 167, 171. Section 27, the Court found, was "thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the [Act]." 328 U.S. at 176.

The Commission and the court of appeals properly applied the principles of *First Iowa* to this case when they held that the Federal Power Act confers on

[4] In the reprint of the court's decision in the appendix, the next sentence reads, "In effect, this does not constitute a veto of the project that was approved and licensed by FERC." It is clear from the context, however, that the addition of the word "not" is a misprint, and in the Federal Reporter, "not" is omitted.

the Commission the ultimate authority to fix minimum flow rates for the Rock Creek project. The court's decision does not conflict with any other decision of this Court or other courts of appeals, and the 1986 amendments to the Act confirm the correctness of the court's understanding of the division of authority between the Commission and the States in this area. Further review is therefore not warranted.

1. Throughout its brief, petitioner stresses only a portion of the language of Section 27—the statute's reference to state laws "relating to the control, appropriation, use, or distribution" of water. *E.g.*, Pet. 7, 15. However, that provision does not save all state laws addressing any of those subjects. Rather, the Act preserves only statutes relating to "water used in irrigation or for municipal or other uses, or any vested right acquired therein." The state regulation at issue in this case is plainly not one that governs "water used in irrigation or for municipal * * * uses" and has nothing to do with "vested rights." It thus must be the State's position that the reference to "other uses" extends to state laws touching upon the very matters that the Commission considers and addresses by means of conditions in the licenses it issues for hydropower projects.

As *First Iowa* makes clear, that contention cannot be reconciled with the language of Section 27 or the structure of the Act as a whole. In *First Iowa*, an applicant was seeking a license to build a power project on navigable waters in Iowa. The State argued that the Commission was obligated to deny the license on the ground that the applicant had not complied with Section 9(b) of the Act, 16 U.S.C. 802(b) (1982), which requires an applicant to provide evidence of

compliance with certain state laws. Specifically, the State contended that the applicant could not get a license unless it secured a state permit for the construction of a dam, which was available only upon compliance with state standards for the construction, operation and maintenance of such a work and a showing that "any water taken from the stream in connection with the project is returned thereto at the nearest practicable place." 328 U.S. at 164-166 (emphasis omitted).

The Court noted that requiring compliance with the Iowa law would grant state authorities "a veto power over the federal project" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" with which the Commission was charged. 328 U.S. at 164. Further, the Court continued, the particular requirements of the state statute at issue "would subject to state control the very requirements of the project that Congress has placed in the discretion of" the Commission and would "strike at the heart of the present project." *Id.* at 165, 163. In order to determine whether the statute required those untoward results, the Court examined the Act as a whole to determine what line it drew between state and federal authority. Because that analysis is so clearly relevant to this case, we quote it at length (328 U.S. at 167-168 (emphasis added)):

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. *The duality does not require two agencies to share in the final decision on the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority.* In fact a contrary policy is indicated in §§ 4(e), 10(a), (b), and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. *A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.*[5]

The Court found that both Section 9(b) and Section 27, the provision at issue here, embodied this division of authority. The Court found that Section 27 was a "saving clause" that was "limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." 328 U.S. at 175-176. The Court concluded, accordingly, that it "has primary, if not exclusive reference to such proprietary rights." *Id.* at 176. The Court found further support for a limited interpretation of Section 27 in that provision's reference to "any vested right acquired therein,"

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[5] The Court stressed this understanding of the Act repeatedly throughout its opinion. *E.g.*, 328 U.S. at 171 (Federal Power Act "has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter"); *id.* at 181 ("The detailed provisions of the Act leave no room or need for conflicting state controls.").

and the Court reiterated, relying on the maxim of *ejusdem generis*, that the phrase "other uses" was "confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *Ibid.*[6] Far from suggesting that state and federal authorities should duplicate one another's efforts, the Court continued, Section 27 "strengthens the argument that, in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course." *Ibid.*

At several levels, therefore, *First Iowa* requires rejection of petitioner's position in this case. That position—that both state and federal authorities may set flow rates for the purpose of protecting fisheries—is directly contrary to *First Iowa*'s construction of the Act as precluding overlapping regulatory authority. Petitioner's interpretation of Section 27 is also impossible to reconcile with the Court's explanation of the limited scope of the phrase "other uses," the language on which the State must rely here. As both the Commission and the court of appeals correctly concluded (Pet. App. A11, A30-A31), these elements of the Court's decision in *First Iowa* cannot be dismissed as mere dicta. Petitioner's construction of Section 27 in fact contradicts the understanding of the Act on which the Court's holding was based.[7]

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[6] It is difficult to characterize a state regulation establishing a minimum flow rate as involving a "use" of the water. But in any event, that "use" bears no resemblance to the specified uses—irrigation and municipal use—by reference to which the phrase "other uses" should be construed.

[7] *First Iowa* also found that the legislative history of the Federal Power Act was consistent with the Court's understanding of the Act. 328 U.S. at 176-177 n.20. This discussion forecloses petitioner's argument for a different interpretation of the same history. See Pet. 16-17.

2. Nor is there any conflict between *First Iowa*'s interpretation of the Federal Power Act and the Court's decision in *California* v. *United States*, *supra*. In *California*, the only question presented was whether, under Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 390,[8] the federal government was required to comply with conditions in a state permit allocating water to a federal reclamation project. 438 U.S. at 647. The Court held that the government was required to comply with conditions that were not inconsistent with "clear congressional directives." See *id.* at 672. In reaching that conclusion, the Court had no occasion to consider the division of authority between the state and federal governments under the Federal Power Act, and it did not refer to, let alone overrule, the decision in *First Iowa*.

For reasons that the Commission explained, there are good grounds for distinguishing *First Iowa* and *California* v. *United States*. Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior, in carrying out the provisions of that Act, to proceed "in conformity with" state laws, whereas the Federal Power Act gives the Commission a "comprehensive

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[8] This statute provides, in pertinent part:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *.

planning role with respect to hydro-electric development on Commerce Clause waters." Pet. App. A34. Thus, "the Court in *California* did not have to address a potential conflict between state requirements and project conditions developed through an agency comprehensive planning process mandated by statute." *Id.* at A34-A35; see *id.* at A12.[9]

Finally, this Court has consistently recognized the continuing vitality of *First Iowa*, both before and after *California*. See, *e.g.*, *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 445-446 & n.16 (1955); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 338-339 n.6 (1982); *Pacific Gas & Electric Co.* v. *State Energy Resources Commission*, 461 U.S. 190, 223 n.34 (1983). Hence, if this settled interpretation of the Federal Power Act is to be reconsidered, it would be the province of Congress rather than this Court to do so.

3. Petitioners argue, not entirely consistently, (i) that there is no conflict between state and federal regulation of the Rock Creek project (Pet. 23-25) and (ii) that the Ninth Circuit's decision upholding the Commission's order will result in inconsistent

[9] Petitioner's argument that *California* overruled *First Iowa sub silentio* is essentially a syllogism taking the following path: (1) Section 27 of the Federal Power Act was patterned after Section 8 of the Reclamation Act of 1902; (2) *California* construed Section 8 to preserve state water laws other than those encompassed by a so-called "proprietary rights theory;" (3) Section 27 must therefore save the same kinds of state laws; and (4) *California* must be understood to overrule *First Iowa*'s dictum to the contrary. See Pet. 7-12. However, no counterpart of the Court's analysis of the Federal Power Act was before the Court in *California*, and, even if there had been, Sections 8 and 27 would properly be interpreted as parts of two quite different statutory schemes.

regulation of rights in the same river (*id.* at 21-23). These contentions are without merit and do not warrant this Court's review.

a. According to petitioner, there is no inconsistency between the Commission's license and the State's permit, because petitioner has not denied a state permit altogether and "the project, in complying with the more stringent state requirements, will necessarily comply with the less stringent FERC requirements." Pet. 23-24. The Commission explained, however, why more stringent state requirements nevertheless impinge on its congressionally-mandated judgments (Pet. App. A29):

> Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by [petitioner] would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state. By imposing higher minimum flows than prescribed in a license, a state could require greater environmental protection than we determined necessary and could cause a project to become economically infeasible.

As the court of appeals put it, petitioner's approach "would, in essence, create a different type of hydropower project from the one described in the license." *Id.* at A12. Thus, even if petitioner's minimum flow requirements would not amount to an absolute veto of the project—an assumption that the project's sponsors have vigorously challenged in proceedings be-

fore the Commission (see *id.* at A17)—they epitomize the kind of interference with the Commission's comprehensive planning judgments that *First Iowa* decried.[10]

b. Petitioner's claim that its position must be adopted to avoid "potentially inconsistent regulation of water rights in the same river" (Pet. 22) is greatly overstated. Under Section 9(a)(2) of the Act, 16 U.S.C. 802(a)(2), an applicant must present "[s]atisfactory evidence" that it has complied with specified categories of state laws. Though compliance with this provision does not require a showing that all state requirements have been satisfied, see *First Iowa Electric Coop.* v. *FPC*, *supra*, it does enable the Commission to consider carefully the extent to which any project has not received full state approval. Further, even before the passage of the ECPA, the Commission's regulations required applicants to consult with

[10] In *First Iowa*, 328 U.S. at 167, the Court indicated that state regulations would conflict with the Commission's planning authority even when the State did not purport to prohibit a project altogether (*ibid.*):

> Compliance with state requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the state requirement, discussed above, that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as "neither desirable nor adequate." Similarly, compliance with the engineering requirements of the [State], if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the finanical success of the project.

See also *Pacific Gas & Electric Co.*, 461 U.S. at 223 n.34.

state agencies concerning the environmental consequences of their projects and to include in their applications copies of documents reflecting those consultations—including, under the regulations in effect when the application here was filed, materials showing "any terms or conditions of licenses that those agencies have determined are appropriate to prevent loss of, or damage to, natural resources." 18 C.F.R. 4.61(d)(2)(iii) (1982).[11] The Commission is thus in a position to consider any valid claim that a hydropower project will undercut a state regulatory program.

To the extent that the Commission does license hydroelectric projects on terms different from those that state authorities would prefer, it is acting in accordance with the power Congress expressly conferred. To require applicants for federal licenses to obtain state permits addressing the very issues that the Commission resolves would "subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the [Commission] or other representatives of the Federal Government." *First Iowa*, 328 U.S. at 164. At bottom, petitioner's claim of inconsistency is an attack on the scheme that Congress adopted in the Federal Power Act. That scheme does not allow

[11] For larger projects, additional detail was required. See 18 C.F.R. 4.41(f) (1982) (requiring preparation of an Environmental Report after specified consultation with appropriate federal, state, and local resources agencies). The Commission promulgated more detailed requirements for consultations with state agencies after the passage of the ECPA. 18 C.F.R. 4.38.

duplicate regulation by States in areas to which the Commission's comprehensive authority extends.[12]

4. Finally, the recent passage of the ECPA confirms the correctness of the court of appeals' decision. That legislation eliminates all possible doubt that the Commission is to have the final authority, after following specified procedures and giving specified weight to the views of state agencies, to establish conditions with which hydroelectric projects must comply in order to protect the environment. The subsequent congressional enactment carries "considerable retrospective weight." *Heckler* v. *Turner*, 470 U.S. 184, 211 (1985). See also *South Carolina* v. *Regan*, 465 U.S. 367, 378-379 n.17 (1984).

As amended by the ECPA, the Federal Power Act now requires the Commission (i) to give "equal consideration" to the environmental consequences of a project, including "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," 16 U.S.C. 797(e), and (ii) to include in each license conditions "for such protection, mitigation, and enhancement," 16 U.S.C. 803(j)(1). Those conditions must be based on recommendations received from federal authorities and "State fish and wildlife agencies." 16 U.S.C. 803(j)(1). The Act establishes a specific procedure governing situations in which the Commission believes that a recommendation from a state agency is inconsistent with the statute's purposes and requirements. The Commission and the agency must first attempt to resolve any such inconsistency; to the extent that they fail, the Commission must publish findings (accompanied by a statement of their basis) that the state agency's recommendation is inconsistent with the Act and that the conditions selected by the Commission comply with the goal of protecting and enhancing fish and wildlife. 16 U.S.C. 803(j)(2).

[12] For the same reason, there is no merit to petitioner's related contention that the court of appeals' reliance on the Commission's comprehensive planning authority was misplaced (Pet. 18-21).

It is impossible to reconcile these provisions with petitioner's interpretation of Section 27, which was left unchanged by the ECPA. Congress would not have established a detailed procedure under which the Commission was to consider the recommendations of state agencies, attempt to resolve any disputes, and make findings regarding irreconcilable differences if it understood that Section 27 reserved to the States the power to impose their recommedations unilaterally.[13] The ECPA therefore reflects unmistakably Congress's adherence to *First Iowa*'s division of responsibility between state and federal authority.[14] Reconsideration of *First Iowa* at

[13] In this case, petitioner recommended adoption of its minimum flow rates in proceedings before the Commission. Pet. App. A15. This case thus demonstrates the "incongruous" (*id.* at A36) situation that would necessarily result from adoption of petitioner's construction of Section 27. Under that view, States could first "recommend" conditions within the area of the Commission's authority and, if those conditions were rejected, impose them.

[14] The conference report accompanying the ECPA described the relevant roles of the States and federal governments in terms that evoke the Court's reasoning in *First Iowa* (H.R. Rep. No. 934, 99th Cong., 2d Sess. 23 (1986)):

> Section 10(j) does not give such agencies a veto, nor does it give them mandatory authority,* * *
>
> Under new section 10(j), FERC is empowered to decide license terms and conditions, but there is a guarantee

this time would interfere with the considered scheme Congress has recently devised to accommodate state and federal concerns in hydroelectric projects.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that the recommendations of the agencies cannot be lightly dismissed. FERC is not required to adopt recommendations that are inconsistent with any other purpose of the Federal Power Act as expressed in section 4(e). See *id.* at 22.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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No. 89-333

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PETITIONER'S REPLY BRIEF

This brief is in reply to the opposition briefs filed by the Federal Energy Regulatory Commission (FERC) and the Rock Creek Limited Partnership ("Rock Creek"). The respondents make several arguments similar to those considered and rejected by this Court in *California v. United States*, 438 U.S. 645 (1978), in its construction of section 8 of the Reclamation Act of 1902. Since section 8 was the progenitor of section 27 of the Federal Power Act (FPA), this Court should reject the same arguments in construing section 27.

I

CONTRARY TO THE RESPONDENTS' ARGUMENT, *FIRST IOWA'S* ANALYSIS OF SECTION 27 IS IN CONFLICT WITH THE *CALIFORNIA* DECISION

In the petition, we argued that *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), is in conflict with *California v. United States, supra*. Pet. 7-14. The conflict arises, we argued, because *First Iowa* stated that section 27 of the FPA is limited to "proprietary rights" and does not authorize state regulation of water use, and *California* adopted the opposite view in construing section 8 of the 1902 Reclamation Act, which, as the Ninth Circuit observed below, was the model for section 27. Pet. 7-14; Pet. App. 9, 10. In reply, the respondents argue that *First Iowa* and *California* are not in conflict because the decisions considered two dissimilar federal programs. FERC Br. 15-16; Rock Creek Br. 10-13. According to the respondents' argument, the FPA provides for "comprehensive" federal regulation of hydropower and the Reclamation Act of 1902 merely "provides for federal funding of irrigation projects." Rock Creek Br. 11.[1]

As noted in the petition, the similarities of the FPA and the 1902 Reclamation Act are stronger than their differences because both acts provide for federal *development* of water for specified economic purposes, and both create federal agencies that are responsible for providing such development. Pet. 12-13.[2] Additionally, both acts provide for utilization of a resource—water—that the states have traditionally regulated and controlled. *Id.* Because of these similarities, it is improbable that Congress intended to displace state water law in one context and not the

[1] In fact, the 1902 Reclamation Act provides for federal authorization, construction and operation of reclamation projects, and Congress' amendatory reclamation laws authorize certain projects to be operated for multiple purposes, including hydropower purposes. See, *e.g., California v. United States*, 438 U.S. 645, 651 (1978) (New Melones Project).

[2] The 1902 Reclamation Act created the Bureau of Reclamation, an agency of the Department of the Interior, to administer the federal reclamation program. *California*, 438 U.S. at 676.

other. Moreover, Congress and the Secretary of the Interior have narrowed any differences in the programs by providing for extensive regulation of federal reclamation projects, both through statutory requirements and administrative regulations. Pet. 12-13. Rock Creek's argument that the Reclamation Act "does not impose a broad federal regulatory scheme," Rock Creek Br. 11, is incorrect.

More importantly, the legislative history of the FPA indicates that Congress followed the precedent of section 8 in enacting section 27, see Pet. 16-17, and thus Congress intended that state water laws would apply equally to its reclamation and hydropower programs regardless of any differences in the programs. Indeed, contrary to the respondents' argument that sections 8 and 27 should be read incongruently, the *First Iowa* Court read the provisions congruently by stating that section 27 "carries" the meaning of section 8 "into" the FPA. *First Iowa*, 328 U.S. at 176 n. 20. Therefore, the congressional policy of deference to state water law that informs section 8, *California*, 438 U.S. at 653, equally informs section 8. Because of the progenitive relationship between the provisions, there is no principled way to distinguish between them with respect to their anti-preemptive effect.

II

CONTRARY TO THE RESPONDENTS' ARGUMENT, *FIRST IOWA* DID NOT DEFINITIVELY RESOLVE THE ISSUE PRESENTED HERE

The respondents argue that *First Iowa* definitively construed section 27 and thus resolved the issue here. FERC Br. 12-14; Rock Creek Br. 5-10. The United States made a similar argument in *California*, asserting as its first argument that "[t]his case is controlled by prior decisions of this Court." Brief for United States, *California v. United States*, at 21, No. 77-285, Oct. Term 1977 (hereinafter "U.S. Br. (*California*)"). This Court rejected the United States argument, holding that the Court's prior decisions had not definitively construed section 8 of the 1902 Reclamation Act.

Similarly, *First Iowa* did not definitively resolve the issue here and the decision can be distinguished here. In *First Iowa*, this Court held only that section 9(b) of the FPA does not require a state water right as "a *condition precedent* or an administrative procedure that must be exhausted *before securing a federal license*." 328 U.S. at 170 (emphasis added). Indeed, the petition for writ of certiorari in *First Iowa* framed the issue in terms of whether section 9(b) required a state water right as a "condition precedent" to a FERC license.[3] This case, on the other hand, arises under section 27 rather than section 9(b), for the project has already acquired a FERC license and California does not challenge the issuance of the license. The question here is whether section 27 imposes an *independent* obligation on a hydropower project to comply with state water law irrespective of its rights and obligations under the federal license, and thus whether the project must acquire a state water right prior to actually diverting water. This question was not presented in *First Iowa*, which focused on the meaning of section 9(b) in FERC licensing proceedings.

To be sure, *First Iowa* went beyond its immediate holding to comment on section 27, stating that section 27 is limited to "proprietary rights" and does not authorize state regulation of hydropower water uses. *Id.* at 176. This statement was dictum because it was unnecessary to the Court's holding concerning the limited scope of section 9(b). This dictum is reminiscent of this Court's earlier dicta concerning section 8 of the 1902 Reclamation Act, to the effect that section 8 is limited to "proprietary

[3] The petition for writ of certiorari in *First Iowa* stated at the outset that:

> "The dominant issue underlying the questions presented is whether *Section 9(b) of the Federal Power Act*, is to be so construed that the State of Iowa, and all other states and territories of the United States, may by statute require a state or territorial permit or license for the construction of a power project, upon navigable waters of the United States, as a *condition precedent* to the issuance of a federal license under Part I of the Federal Power Act." Pet. for Writ of Cert., *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, at 8-9, No. 603, Oct. Term, 1945 (emphasis added).

rights" and does not authorize state regulation of federal water uses. *Ivanhoe Irrigation Dist. v. MacCracken*, 357 U.S. 275, 291-292 (1958) (dictum); *City of Fresno v. California*, 372 U.S. 627, 630 (1963) (dictum). In *California v. United States*, 438 U.S. 645, this Court characterized the "proprietary rights" statements in *Ivanhoe* and *City of Fresno* as "dicta," rejecting the dissenting opinion's view that the statements comprised the "holding" of the earlier cases. 438 U.S. at 691 (White, J., dissenting). The *California* majority opinion then specifically "disavow[ed]" the dicta, stating that section 8 "does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'" 438 U.S. at 672-674, & n. 24. Since *California* rejected the earlier dicta in *Ivanhoe* and *City of Fresno* that section 8 is limited to "proprietary rights," and since section 8 served as the model for section 27, this Court should now reject the *First Iowa* dictum that section 27 is limited to "proprietary rights."

III

ON ITS FACE, SECTION 27 AUTHORIZES RATHER THAN PRECLUDES STATE REGULATION OF HYDROPOWER WATER USES

The respondents argue that their "proprietary rights" argument is supported by the language of section 27, which saves state laws relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.). According to their argument, hydropower uses are not encompassed within the category of "irrigation" uses, "municipal" uses, "other uses" or "vested rights." FERC Br. 11, 13-14; Rock Creek Br. 11-12.

In *California*, this Court rejected this same argument in construing section 8 of the 1902 Reclamation Act. Similarly to section 27, section 8 saves state laws relating to the "control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. §§ 372, 383. In

California, the United States argued, among other things, that section 8 is limited to "irrigation" uses and that the State Board conditions in that case "have little to do with irrigation." U.S. Br. (*California*) 36. This Court rejected the United States' argument by holding that state water laws apply to *all* water uses of federal reclamation projects, not just irrigation uses. *California*, 438 U.S. at 665, 667. The Court stated that section 8 requires compliance with "the substance, as well as the form, of state water law," and that the United States' argument "would trivialize the broad language and purpose of § 8." *Id.*[4] Since *California* held that section 8 establishes a broad policy of deference to state water law that transcends "irrigation" uses, this Court should construe section 27 of the FPA in the same way. Therefore, the reference to "other uses" in section 27 includes *all* water uses that fall within traditional state jurisdiction, including hydropower uses.

IV

THE RESPONDENTS' ARGUMENT WOULD RESULT IN POTENTIALLY INCONSISTENT REGULATION OF WATER RIGHTS IN THE SAME RIVER

In the petition, we argued that the Ninth Circuit decision would result in potentially inconsistent regulation of water rights in the same river. Pet. 21-23. In reply, FERC asserts that, to the extent that FERC adopts different regulations than the states in a particular river, FERC "is acting in accordance with the power Congress expressly conferred." FERC Br. 19. In effect, FERC concedes that its view results in potentially inconsistent regulation of water rights, and argues that Congress mandated such inconsistency in enacting the FPA. Again, this Court in *California* rejected the same argument in construing section 8, commenting unfavorably that "legal confusion . . . would arise if federal water

[4] On remand, the Ninth Circuit, in a decision authored by then Judge Kennedy, held that section 8 requires the United States to comply with state law with respect to *all* uses—including hydropower uses—of multiple purpose projects, thus again rejecting the United States' argument that section 8 does not apply to non-irrigation uses. *United States v. California*, 694 F.3d 1171 (9th Cir. 1982).

law and state water law reigned side by side in the same locality." 438 U.S. at 668-669.

Indeed, since Congress has traditionally deferred to state water laws, it is highly unlikely that Congress would depart from this traditional policy in establishing a federal regulatory program concerning *private* projects that affect local rather than national interests, where such departure would preclude the states from providing for coordinated management and regulation of all water rights in individual river systems. This Court has noted that water rights are "highly interdependent," and that such interdependency supports the need for "comprehensive state systems for adjudication of water rights." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Because of such interdependency, it is unlikely that Congress would impair the states' traditional authority to regulate and coordinate water rights without clearly manifesting its intent on the subject. To the contrary, the legislative history of the FPA indicates that Congress intended to require hydropower projects to comply with state water laws to the same extent that others must comply, and indeed to the same extent that, after *California*, the United States itself must comply. Thus, Congress provided for uniform rather than inconsistent regulation of water rights in individual river systems.

V

THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL REGULATION OF THE HYDROPOWER PROJECT IN THIS CASE

In the petition, we argued that there is no conflict between the state and federal regulations in this case because, first, California has granted rather than denied a water right permit for the Rock Creek project, and, second, California's flow requirements are more stringent than FERC's flow requirements, and thus the project—in complying with California's flow requirements—will necessarily comply with FERC's requirements. Pet. 23-24. In reply, FERC argues that California's flow requirements, even though more stringent than the FERC requirements, interfere

with FERC's authority to make "comprehensive planning judgments" and to "balance" competing hydropower and non-hydropower needs. FERC Br. 17-18. In effect, FERC argues that Congress has "occupied the field" of water regulation, thus leaving no room even for state laws that do not "conflict" with federal regulation. The United States made the same argument in *California*, asserting that "[w]hile Congress has provided for extensive federal-state coordination, it has also recognized that someone must have the final administrative authority," and that "Congress has lodged that authority in the Federal Government, and in the Secretary of the Interior in particular." U.S. Br. (*California*) 34. The *California* Court rejected the United States' argument, holding that state water laws apply to federal reclamation projects to the extent that such laws are not inconsistent with congressional directives. 438 U.S. at 662 n. 25.

The respondents' "occupation of the field" argument should be similarly rejected here. The argument is inconsistent with the broad language and purpose of 27, which provides, on its face and in its historical context, that state water laws play a significant role in the federal regulatory process. Under section 27, FERC and the states have *concurrent* jurisdiction over hydropower projects, and FERC's jurisdiction therefore is not exclusive. The FPA's regulatory scheme is similar to that of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, which, as this Court has held, provides that the Army Corps of Engineers and the states exercise *concurrent* jurisdiction over water projects that affect both federal navigation interests and state water rights interests. *Cummings v. Chicago*, 188 U.S. 410, 431 (1903); see Pet. 20.

Finally, FERC's "occupation of the field" argument is inconsistent with FERC's own contemporaneous construction of the FPA. In 1924, FERC's predecessor, the Federal Power Commission (FPC), issued an opinion stating that:

> "The development of water power on the lands of the United States requires the approval of both the State and the Federal Governments, the former granting the right to use the water, the latter the right to use the land. Under the Federal water power act a license may not be issued until an applicant has secured its water rights from the appropriate State authority." FPC, Fourth Annual Report, at 10-11 (1924).

In 1927, the FPC expressly stated that the states have the right to "veto" FPC-licensed projects that are unable or unwilling to comply with state water laws. FPC, Seventh Annual Report, at 3 (1927). In 1931, the FPC stated that:

> "Congress, in this legislation, perhaps more than in any other piece of legislation on similar subjects, has sought to protect and preserve to the States not only the rights, privileges and benefits of the State in the resource itself, but its power, through local governmental action, to regulate and control the resources thus developed to the advantages of its citizens." FPC, Eleventh Annual Report, at 12 (1931).

The FPC's contemporaneous interpretation of the FPA more accurately reflects the congressional intent than FERC's interpretation today.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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46 p

QUESTION PRESENTED

Can the Federal Energy Regulatory Commission in licensing a hydroelectric project preempt State water law regulations designed to protect the fish and wildlife resources in the State's rivers?

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INTEREST OF AMICI CURIAE

Amici Curiae[1] American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River, Environmental Policy Institute, Trout Unlimited, and Save Our Streams are non-profit conservation organizations committed to the preservation and enjoyment of America's natural rivers.[2] These organizations have a cumulative membership of approximately 1,000,000 persons.

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[1]Pursuant to Supreme Court Rule 36.1, the consent of the parties to the filing of this amicus curiae brief is filed herewith.

[2]See Appendix I for description of Amici Curiae.

The decision of the Court of Appeals for the Ninth Circuit is of concern to Amici because it eviscerates State authority to protect river resources from the adverse effects of ill-conceived hydroelectric development. Using their authority to regulate water uses and water flow, California and other states have the ability to minimize the adverse effects of hydroelectric projects on streamflow and fish and wildlife resources. The decision of the court below excludes the States from regulating stream flow at and below hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC), and deprives the States of their traditional regulatory authority to protect fish and wildlife resources.

Construction of new dams and diversions for hydropower is one of the greatest threats to our nation's remaining free-flowing rivers. Hydroelectric projects can turn free-flowing rivers into slack lagoons, destroying the biological, scenic and recreational values of the nation's remaining undammed rivers. They block salmon and other anadromous fish from reaching their traditional spawning grounds and destroy other natural fisheries by changing stream temperature and chemistry. Hydroelectric projects also frequently degrade water quality and can dramatically destroy natural riverine landscapes.

This case is of special concern to Amici because of the dramatic increase

over the last decade in the pace and extent of development of our nation's rivers for hydropower. Since the FERC (formerly the Federal Power Commission) was established in 1920, approximately 2000 non-federal hydroelectric projects have been constructed under federal license. However, since the early 1980's, the FERC has received over 7000 applications to study or construct specific hydroelectric facilities. Each year since 1980, the FERC has given final regulatory approval to approximately 200 projects nationwide. Regrettably, this increased pace of development, and the associated environmental costs, has produced little energy gain for the nation. The Rock Creek project is a case in point -- it would ostensibly produce 7,000 megawatt-hours of electricity, or

less than five one thousandths of one percent of California's annual electricity consumption.[2]

Amici offer a perspective in this case that is distinct from the position of either the State of California or of the Federal Energy Regulatory Commission. The State of California argues, in effect, that state water rights laws should have primacy over the regulatory decisions of the FERC. The FERC contends that the Federal Power Act completely preempts state regulation of hydroelectric facilities and, therefore, the State lacks authority to set stream bypass flows for FERC-licensed

[2]California Statistical Abstract, California Department of Finance, p. 181 (1987).

hydroelectric projects. Amici present a middle position consistent with the traditional allocation of environmental regulatory authority in our federal system: that the States and the FERC have concurrent jurisdiction over hydroelectric facilities and that operators of hydroelectric facilities should comply with the regulatory requirements of both the FERC and the states. In other words, hydroelectric licensees should comply with the highest of the minimum bypass flows imposed by the state or the FERC.

SUMMARY OF ARGUMENT

Pursuant to Supreme Court Rule 17.1(c), this Court should grant the petition filed by the State of California

in order to resolve the conflict between the decision of the court below and California v. United States, 438 U.S. 645 (1978), and to address this important issue concerning the proper balance between federal and state environmental regulation of hydroelectric projects.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH CALIFORNIA V. UNITED STATES

The decision of the court below, State of California v. FERC, 877 F.2d 743 (9th Cir. 1989), rests squarely on this Court's decision in First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946). However, in California v. United States, 438 U.S.

645 (1978), this Court rejected the analytic foundation for its earlier decision in First Iowa. Thus, the decision below is in sharp conflict with this Court's latest holding on the subject of federal preemption of water regulatory laws applicable to federal water development projects. To resolve the conflict in its own decisions, as well to correct the decision of the court below and of other lower federal courts, see, e.g., Town of Springfield v. McCarren, 722 F.2d 728 (2d Cir. 1983), the Court should grant certiorari and reverse.

In First Iowa, this Court overturned a decision by the Federal Power Commission denying a license for a project on the ground that the

developer had not received a use permit under Iowa law. While the decision turned on the proper interpretation of section 9(b) of the Federal Power Act, the Court also commented on section 27 of the Act, which provides that federally licensed hydroelectric projects are subject to state laws relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses." 16 U.S.C. § 821. This Court stated that section 27 saves certain state laws "relating to property rights as to the use of water" and that it "has primary, if not exclusive, reference to such proprietary rights." 328 U.S. 175-76. The Ninth Circuit Court of Appeals relied on this statement in the present case in ruling that the State of California

lacked the authority to require higher minimum bypass flows than those provided in the FERC license. 877 F.2d at 749.

In California v. United States, this Court held that section 8 of the Reclamation Act, 43 U.S.C. § 383, generally requires federal agencies to comply with terms and conditions attached to state water permits. Section 8 provides, in language virtually identical to that of section 27, that federal reclamation projects are subject to state laws "relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired therein." 43 U.S.C. § 383. Significantly, in First Iowa the Court expressly noted that section 27 was modeled after the language of section 8

and should be interpreted in the same fashion. 328 U.S. at 176 n. 20.

Not only did this Court in California v. United States reach an entirely different conclusion than the First Iowa Court about the meaning of the statutory language, the Court in California v. United States expressly rejected the proprietary rights theory that provided the basis for the Court's conclusion in First Iowa that section 27 was not intended to preserve state regulatory authority over hydroelectric projects. 438 U.S. at 674-675. Further, this Court specifically disavowed several decisions which expressly relied on the First Iowa decision and the proprietary rights theory. 438 U.S. at 674-675; see Ivanhoe Irrigation District v. McCracken,

357 U.S. 275, 291-92 (1958); City of Fresno v. California, 372 U.S. 627, 629-30 (1963). The rejection of the proprietary rights theory in California v. United States effectively overrules the reasoning of the First Iowa decision.

The Court of Appeals for the Ninth Circuit offered several unconvincing reasons for its refusal to follow this Court's teachings in California v. United States. First, it reasoned that this Court's interpretation of section 8 did not effectively overrule this Court's interpretation in First Iowa of section 27 because the two sections "address two different and entirely separate water use systems." 877 F.2d at 749. This statement is unconvincing, because both the Federal Power Act and the Reclamation

Act deal with water development projects. These projects, whether federally licensed or operated, have the same potential for interfering with the objectives of state water regulatory laws. Thus, there is no difference between the Bureau of Reclamation's water development program and the FERC's licensing program that justifies a different interpretation of the same statutory language applicable to each agency. Indeed, if anything, there is a stronger case for federal preemption of state water laws applicable to Bureau projects built and operated by the federal government, than in the case of non-federal projects subject only to federal licensing by the FERC.

Second, the Court of Appeals for the Ninth Circuit pointed to the "comprehensive hydropower planning authority" vested in the FERC as further support for the conclusion that the Federal Power Act preempts inconsistent state regulation. 877 F.2d at 748. It is correct that Congress has directed the FERC to ensure that its licensing decisions with respect to individual projects are consistent with comprehensive, basin-wide plans designed to achieve an appropriate balance between competing public uses of rivers. See LaFlamme v. FERC, 842 F.2d 1063 (9th Cir. 1988); National Wildlife Federation v. FERC, 801 F. 2d 1505 (9th Cir. 1986). However, it does not follow from this grant of comprehensive planning responsibility that Congress intended to

vest exclusive regulatory authority over hydroelectric projects in the FERC alone.

In 1920, when Congress first established the Federal Power Commission, predecessor to the FERC, it affirmatively recognized, not only in section 27, but in other provisions that the Commission would share regulatory authority over hydroelectric development with other governmental agencies. Section 4(e) of the Federal Power Act provides that the FERC may issue a license on certain federal lands only after it determines that the project "will not interfere or be inconsistent with the purpose for which such [federal] reservation was created or acquired;" however, the provision goes on to state that "the license shall be subject to and contain

such conditions as the Secretary of the department under whose supervision such reservation falls [i.e., Interior or Agriculture] shall deem necessary for adequate protection and utilization of such reservation." 16 U.S.C. § 797(e).

In Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), this Court ruled that section 4(e) requires the FERC to accept without modification conditions prescribed by the Secretaries of Interior or Agriculture for hydroelectric development. This Court rejected the argument that the FERC's comprehensive planning responsibilities were inconsistent with the conclusion that section 4(e) granted the Secretaries mandatory conditioning authority. 466

U.S. 778 n.21. Following this reasoning, the Court in this case should reject the conclusion of the court below that the FERC's comprehensive planning responsibilities preclude the application of mandatory state water law requirements to hydroelectric projects.

A variety of other federal and state resource agencies also play important roles in regulating hydroelectric development, further contradicting the argument that exclusive regulatory control must be vested in the FERC. For example, under section 404 of the Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344(a), the U.S. Army Corps of Engineers is authorized to issue permits for the discharge of dredged or fill material to

navigable waters at a specific disposal site. Because the construction of a dam or hydroelectric facility typically involves the use of dredged or fill material, the Corps of Engineers generally has concurrent jurisdiction with the FERC over hydroelectric projects. See Monongahela v. Marsh, 809 F.2d 41 (D.C. Cir. 1987) (rejecting contention that the FERC has exclusive jurisdiction over hydroelectric development).

Similarly, under section 401 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1341, a FERC licensee is required to obtain water quality certification from state officials before constructing a hydroelectric project. In Roosevelt

Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982), the court affirmed the breadth of state control over projects requiring federal licensing and emphasized that a state certification can include such limitations as are necessary to assure compliance "with any appropriate requirement of state law." Id. at 1056. Under Roosevelt Campobello, if a state legislature or state agency prohibits or sets conditions on a proposed hydroelectric project, and if the state's water quality agency includes those requirements in its section 401 water quality certification, those conditions are binding on the FERC and must become part of the FERC license.

Another example of Congress' intent to share the planning

responsibilities for hydroelectric projects with agencies other than the FERC is the 1986 amendment of Section 10(a) of the Federal Power Act requiring the FERC to consider "[t]he extent to which the project is consistent with a comprehensive plan ... for improving, developing or conserving a waterway or waterways affected by the project that is prepared by -- (i) an agency established pursuant to Federal law that has authority to prepare such a plan; or (ii) the State in which the facility is or will be located." 16 U.S.C § 803(a)(2)(A). Thus, Congress specifically provided for separate federal agency and state planning for waterways, to complement the FERC's own comprehensive planning activities.

II.

THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING THE PROPER ALLOCATION OF ENVIRONMENTAL REGULATORY AUTHORITY BETWEEN THE STATES AND THE FEDERAL GOVERNMENT

This Court should also grant certiorari because this case presents a substantial controversy of major interest to hydroelectric developers, state officials, and conservation interests. The public interest will be served if this Court grants the petition and definitively resolves the extent to which the Federal Power Act preempts state water regulatory laws applicable to hydroelectric projects.

Amici support a clear, definite role for state water regulatory officials because these officials have substantial knowledge about and expertise in managing the specific resources affected by hydroelectric development. State officials are very knowledgeable about the rivers and streams that offer important fishing opportunities, wildlife habitat or are used for recreational pursuits such as whitewater kayaking and canoeing. They manage these rivers and streams on a day-to-day, year-to-year basis, balancing the need for municipal and agricultural water against the flows required to support the natural ecology in and along these rivers and streams. Moreover, state water resource managers have detailed knowledge about other water resource demands, and must manage entire

rivers systems as economic and ecological units.

Amici believe that the most appropriate resolution of the conflicting demands of the States and the FERC is to recognize that each has concurrent jurisdiction over minimum by-pass flows for hydroelectric licenses. While section 27 clearly preserves state authority to apply state water laws to hydroelectric projects, this provision cannot reasonably be read to grant such extensive authority to the states that they would be permitted to contradict the FERC's licensing jurisdiction. Section 27 is properly reconciled with the rest of the Federal Power Act if hydroelectric developers are required to comply with the requirements set under state water

laws and with the requirements imposed by the FERC under the Federal Power Act.

There is no necessary conflict between state and federal requirements for by-pass flows. In this particular case, for example, the FERC required a minimum by-pass flow of 11 and 15 cubic feet per second depending on the season, and the California Water Resources Control Board required a minimum by-pass flow of 30 and 60 cubic feet per second. While the minimum flow required by the Board is higher than the minimum flow required by the FERC, there is no evidence that the licensee cannot comply with both requirements at the same time.

Nothing in the language of section 27 suggests that this provision was

intended to provide the states exclusive jurisdiction to establish water flows at hydroelectric projects. Section 27 states that the Federal Power Act should not be construed "as affecting or intending to affect or in any way to interfere" with state water laws. 16 U.S.C. § 821. The Federal Power Act does not affect or interfere with state water law so long as it is understood that a FERC licensee is subject to concurrent state jurisdiction, and the licensee must comply with the requirements of the FERC and the state.

At the same time, there is no indication in the Federal Power Act that the preservation of state water regulatory authority in section 27 was intended to permit the states to

unreasonably interfere with the FERC's licensing decisions. This is precisely the type of conflict that would occur, however, if the states had exclusive regulatory authority over water flow and if state conditions imposed pursuant to that authority superseded FERC license conditions. There is nothing in the language or legislative history of section 27 to suggest that Congress intended for the states, relying on the authority reserved to them under section 27, to be able to require a licensee to violate the terms of the FERC license. It is worth underscoring that section 27 reserved state authority to regulate only certain aspects of a hydroelectric project; the provision does not subtract from the FERC's authority, granted by

other provisions of the Act, to license and regulate the project.[3]

The conclusion that the Federal Power Act grants the FERC and the states concurrent jurisdiction is supported by common sense. It is literally impossible for the FERC to confine its jurisdiction to the construction and operation of hydroelectric facilities, on the one hand, and for the states to regulate the appropriation and use of water, on the

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[3]Moreover, contrary to the conclusion of court below, 877 F.2d at 749, there is no basis for the assertion that changing the flow rates would constitute a veto of the project. This Court rejected a similar argument in the hydroelectric licensing context in Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 776-780 (1984) (Secretary of Interior's power to require that conditions be included in hydroelectric license not a veto power of the project).

other. Decisions about the appropriate direction and quantity of water flow at a hydroelectric project go to the very heart of the hydroelectric licensing process. As a result, if the states had exclusive authority over water rights issues associated with hydroelectric projects, the states would in effect have exclusive authority over the construction and operation of hydroelectric facilities. Thus, the practical overlap between water regulation and hydroelectric licensing requires some overlap in the authority exercised by the FERC and by the states. In sum, the best construction of section 27, read in the context of the Federal Power Act as a whole, is that a FERC licensee should be required to comply with all the terms and conditions of its FERC license as well

as the requirements of state water regulations.

Finally, concurrent federal and state jurisdiction over hydroelectric development is consistent with this Court's recent decision in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), concerning the appropriate regulatory balance between state and federal control over natural resources. In Granite Rock, this Court approved the state and the federal government's shared regulatory authority over natural resources by upholding a permit requirement imposed by the California Coastal Commission on a mining developer operating on federal land. Although the project was located on lands administered by the U.S. Forest Service,

this Court required the mining developer to obtain an additional permit from the state agency. The decision of the court below in this case directly conflicts with Granite Rock's teaching that federal agencies must accommodate state environmental regulatory authority. Moreover, under Granite Rock, the FERC's assertion of exclusive jurisdiction amounts to an argument that there is no possible set of conditions that the California State Water Resources Control Board could place on the hydroelectric license that would not conflict with federal law, i.e., a facial challenge to the State Water Board's minimum flow requirement. Granite Rock soundly rejected this approach.

CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to grant the petition for certiorari of the State of California.

DATED: September 22, 1989

Respectfully submitted,

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APPENDIX I.

DESCRIPTION OF AMICI CURIAE

American Rivers is a non-profit organization with offices located at 801 Pennsylvania Avenue, S.E., Washington, D.C. The mission of American Rivers is to preserve America's outstanding rivers and their landscapes. With approximately 12,000 members across the country, American Rivers is the nation's principal river conservation organization.

National Audubon Society is one of the oldest, largest, and most experienced national conservation organizations. It has approximately 500,000 members, including approximately 65,000 members in the State of California, who are dedicated to the

conservation and wise use of natural resources and protection of the environment. National Audubon Society is incorporated under the laws of the State of New York and has its corporate headquarters at 950 Third Avenue, New York, New York 10022. High among National Audubon Society's purposes is the conservation of the nation's waters and the protection of riparian and aquatic habitat.

Friends of the Earth is a national and international conservation organization, incorporated in the State of New York, with approximately 15,000 members residing in the fifty United States and affiliate conservation organizations in thirty-one different countries around the world. Friends of

the Earth has a long history of seeking to preserve special free-flowing rivers and streams and promoting ecologically sound hydroelectric development. Its members use and enjoy many of the rivers and streams that are threatened by hydroelectric development.

The Sierra Club is a non-profit corporation organized in 1892 under the laws of the State of California, with its principal place of business in San Francisco, California and other offices located throughout the nation. The Sierra Club is a national conservation organization with approximately 420,000 members dedicated to protecting natural resources, including outstanding riverine resources. Approximately 160,000 of the

Club's members reside in the State of California.

American Whitewater Affiliation was established in 1961 to protect and enhance the recreational enjoyment of whitewater sports in America. The primary focus of the Affiliation's activities has been the preservation, protection and enjoyment of whitewater rivers in America and throughout the world. The Affiliation is a Missouri not-for-profit corporation with approximately 1300 individual or business members and 61 affiliate members.

Friends of the River is a California non-profit organization with 9,000 members. Its mission is to preserve streams and rivers in their

natural state in the western United States. Most of its members use rivers and streams for fishing, boating, walking, aesthetic appreciation and other forms of recreation. Friends of the River is frequently involved in proceedings before the Federal Energy Regulatory Commission and the State of California Water Resources Control Board.

Environmental Policy Institute is a national conservation organization dedicated to the protection of the environment and the conservation of natural resources. It is vitally interested in assuring the maximum protection for America's most outstanding rivers. Environmental Policy Institute has a longstanding interest in promoting sound water development policy, and has

assisted state as well as local organizations in river protection efforts.

Trout Unlimited is a non-profit 501(c)(3) coldwater conservation organization whose offices are located at 501 Church Street, N.E., Vienna, Virginia, 22180. Trout Unlimited's purpose is to protect, enhance and preserve the coldwater fisheries of North America. Its 64,000 members, including some four hundred local chapters, assist local, state and federal agencies in fisheries management. A key to maintaining coldwater fisheries' biological integrity is the quantity and quality of the water. Thus, Trout Unlimited works to assure stream flows that support strong salmon populations.

Save Our Streams (SOS) is a grassroots volunteer organization devoted to preservation of free-flowing streams on federal lands in California. SOS has 750 members who use California streams for hiking, swimming, fishing, and spiritual renewal.

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No. 89-333

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MODESTO IRRIGATION DISTRICT AND TURLOCK IRRIGATION DISTRICT AS *AMICI CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTION PRESENTED

Should this Court overrule *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), and more than 40 years of Supreme Court precedents and administrative practice so that the State of California can assume control over hydroelectric power projects already constructed or planned for construction?

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INTEREST OF *AMICI CURIAE*

This Brief is filed pursuant to Supreme Court Rule 36 by the Modesto Irrigation District and Turlock Irrigation District ("the Districts") as *amici curiae* in support of Respondent, the Federal Energy Regulatory Commission ("FERC"). The Districts are irrigation districts organized and operated under the California Water Code. The Districts are agencies of the State of California exercising governmental functions, *see* Cal. Water Code § 20570; this brief is sponsored by the chief legal representative of each irrigation district. Consequently, no consents to the filing of this brief are required under this Court's Rule 36.4.[1] These Districts *oppose* the position advocated in the State of California's petition for certiorari as ill-advised, unworkable, and contrary to Congress' intent and longstanding legal precedent.

[1]Nevertheless, the Districts do have the consent of the parties to file this brief.

The Districts hold an FERC license for the construction and operation of a 165 megawatt hydroelectric plant on the Tuolumne River in California, which became operational in 1971 and was built at an original cost of about $92.5 million. By amendment to the license, FERC recently authorized the addition of a fourth generating unit at the plant and approved amendments to provide for additional fish studies agreed upon by the Districts and the California Department of Fish and Game and the U.S. Fish and Wildlife Service. Article 37 of the license sets forth the minimum flow release schedule for the protection and maintenance of fish below the dam under normal, dry, and critically dry runoff conditions. The normal water year schedule was modified by agreement of the Districts and the California Department of Fish and Game as authorized by Article 37 and the modified schedule was approved by FERC in the above license amendment. FERC retains authority to make further changes as may be required, upon notice and an opportunity for hearing.

From 1971 until 1985, the Districts operated their jointly owned project, called the "New Don Pedro Project" (hereinafter "New Don Pedro") in harmony with the state agency responsible for administering state water rights, the State Water Resources Control Board ("State Board"), represented by the Petitioner. Since 1985, the State Board has taken the position that it has the power to impose fish water release requirements different from and more burdensome than FERC requirements, and the right—on an after-the-fact basis—to attach conditions to the outstanding FERC license for New Don Pedro. The State Board's justification for this position has been the public trust doctrine, which under California law purports to allow reallocation of water from vested rights to so-called public uses. As *amici curiae* in this proceeding, the Districts oppose any change in the supremacy of FERC hydroelectric power licenses and support the Ninth Circuit's determination that the holders of such licenses, once issued, are free from interference by state agencies in areas covered by the FERC license.

SUMMARY OF ARGUMENT

In the court below, the State of California boldly sought to usurp through "state preemption" the congressionally mandated powers of FERC and take over the management of new and existing hydroelectric projects on the navigable rivers of California. The Ninth Circuit rejected California's position based on this Court's ruling in *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), which held that Congress intended the Federal Power Commission (now FERC) to have exclusive licensing and supervisory authority over hydroelectric plants on navigable waterways. In *First Iowa*, the Court examined the text of the statute, its structure, purpose and legislative history, and rejected the claim of the State of Iowa that a state veto and dual sovereignty were intended by Congress.

California contends that the time has come for this Court to overrule *First Iowa*. Yet it cites no persuasive reason for this Court to do so. The Court has consistently adhered to the view it expressed in *First Iowa*. In its Ninth Circuit briefs, the State purported to find "new" legislative history that justified its view, but as the Ninth Circuit recognized, 877 F.2d at 749-50; Pet. App. A-12 to A-13, the very extracts from the congressional debates the State cited were considered by this Court in 1946 and found not persuasive.

The State claims that *California v. United States*, 438 U.S. 645 (1978), justifies departure from *First Iowa*, neglecting to concede that this Reclamation Law case is now nearly 12 years old and that *First Iowa* has been thereafter repeatedly cited as authoritative by this Court. *California v. United States* restored to Section 8 of the Reclamation Law the meaning found in it from 1902 to 1958; the State would use that case to deprive the Federal Power Act of the settled meaning it has enjoyed since 1946.

The dual sovereignty that the State seeks in its petition for certiorari is unworkable. For example, FERC established a June bypass flow of 11 cubic feet per second ("cfs") for the Rock Creek project, thereby simultaneously allocating the remaining flow for hydropower generation. The State Board

later decreed a June bypass flow rate of 60 cfs. If the FERC mandated minimum bypass flow is 11 cfs, it cannot also be 60 cfs because the 60 cfs bypass flow results in a different allocation of water between the two competing uses. One agency must decide how much water shall be released for the protection of fish below a hydroelectric project. California says it should decide; the statute, this Court's precedents and 40 years of history say it should not—FERC should decide. This Court should deny the State's petition because there is no reason for the Court to reopen the issues settled long ago in *First Iowa*.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

CALIFORNIA HAS NOT PRESENTED ANY VALID REASON FOR THIS COURT TO DEPART FROM ITS LONGSTANDING CONSTRUCTION OF THE FEDERAL POWER ACT IN *FIRST IOWA*

In the first two decades of this century, a great public debate raged over what the federal government's proper role should be in the development and administration of hydroelectric power. That debate brought to bear the views of some of the great minds of that era including Theodore Roosevelt and Gifford Pinchot. *See, e.g.*, G. Pinchot, *The Long Struggle For Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945). In that heated and bitter debate the conservationists succeeded in persuading Congress to delegate comprehensive authority for the power development of the nation's rivers to the Federal Power Commission. In the Federal Power Act of 1920 ("FPA"),[2] Congress adopted the comprehensive federal structure sought by conservationists.

In 1946 this Court carefully reviewed the great debate leading to the FPA and confirmed that Congress intended for the Federal Power Commission to exercise the full measure of federal authority in administering power development of

[2]41 Stat. 1063 (1920).

the nation's rivers. *See First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946). The Court concluded that Congress intended for states to exercise only an advisory role in recommending to the FPC how to manage power developments within their borders.[3]

In the nearly 70 years since Congress' passage of the FPA and the more than 40 years since this Court confirmed Congress' intent to equip the FPC with a full measure of federal authority, Congress has not chosen to amend the FPA to permit the states to exercise a veto over the decisions of the FPC.

The massive power projects that Congress envisioned came to fruition and now dominate the major navigable rivers of the country. The diverse water works and power networks managed by the FERC transcend state boundaries, spanning entire river basins and requiring coordination at all levels of stream flows, water storage, and power generation. As an impartial regulator within our federal system, the FERC listens and responds carefully to the concerns of the states in the interstate management of the nation's water resources. Yet, as Congress intended and this Court confirmed long ago, it is the federal agency and not the individual states that ultimately moderates the regulation of these federally approved power projects. In reliance on the administrative structure that Congress protected from parochial control by the several states, hydropower project sponsors (and their bondholders) have invested billions of dollars to create and maintain the massive power system Congress envisioned.

The State of California now seeks to upset Congress' regulatory framework to permit itself and other states—not the FERC—to dictate the conditions under which long

[3]California argues in its Petition, as it did below, that the FPA's legislative history does not support the Court's ruling in *First Iowa*. Pet. at 16-17. The State is presenting a reprise of the same legislative history arguments, based on the same materials, that this Court rejected in *First Iowa*. The Court does not ordinarily grant certiorari simply to review again legislative history arguments that it studied and rejected before. The Ninth Circuit recognized correctly that the State's tired re-run offers no new insights into Congress' intent in 1920 when it adopted the FPA. *See* 877 F.2d at 749-50, Pet. App. A-12 to A-13.

established power projects on the nation's rivers will be allowed to operate. Yet California seeks this massive retroactive policy reversal not from Congress, which chartered FERC's sweeping mandate of federal authority, but from this Court, in the guise of re-interpretation of Congress' intent.

Nothing has happened in the forty-three years since this Court's ruling in *First Iowa* to modify this Court's perspective on what Congress intended when it adopted the Federal Power Act in 1920. This Court had available then the same indicia of original legislative intent it has now. Moreover, Congress, through its decision not to tamper with the balance of federal authority struck in the FPA, has ratified and concurred in this Court's frequently reiterated conclusion that Congress intended for the FPC to exercise comprehensive federal authority. If, as the State of California now implies, circumstances require the states to have authority to veto decisions by FERC, Congress is free to recast FERC's authority. On questions of statutory interpretation, this Court defers to Congress to amend a statute to meet perceived changes in the nation's needs. *See Patterson v. McClean Credit Union*, 491 U.S. ____, 109 S.Ct. 2363, 2370 (Kennedy, J.) & 2385 (Brennan, J., concurring) (1989) (special justification required for departure from *stare decisis* on matters of statutory interpretation). This Court should decline California's revisionary invitation here to amend the Federal Power Act by ignoring: (1) the circumstances of the Act's adoption; (2) the reliance on the Act's uniform interpretation for over 40 years; (3) and the continuing availability of the political process to address any changes in circumstances that may argue for changes in the allocation of federal and state authority.

II.

CALIFORNIA V. UNITED STATES, CONSTRUING THE RECLAMATION LAW, OFFERS NO GUIDANCE FOR THE DECISION OF THIS CASE

California's arguments in its petition boil down to one issue: should this Court overrule *First Iowa* and more than 40 years of Supreme Court precedents and administrative practice so that the State of California can assume control

over hydroelectric power projects already constructed or planned for construction? In asking this Court to overrule its decision in *First Iowa*, California ignores the vast differences between Congress' 1902 program for reclamation of arid lands and its 1920 program for federal administration of hydroelectric projects. The State of California places great reliance on the Court's decision in *California v. United States*, 438 U.S. 645 (1978) (the *New Melones* case), which required the Secretary of the Interior to conform to state law in administering irrigation projects under the 1902 Reclamation Law.

New Melones is not a proper guide for the decision of this case. It was governed by the Reclamation Law of 1902; this case is governed by the Federal Power Act of 1920. The historical forces that produced the two acts and the problems they were designed to solve were quite different. The Reclamation Law was originally intended to conquer the desert by bringing irrigated agriculture to arid western lands. It created a public works program in which the federal government supplied the otherwise absent capital for irrigation development. The Bureau of Reclamation built and operated the projects within the framework of a state legal system that provided the water rights and authorized the organization of water districts that obligated themselves to pay construction, operating and maintenance costs.[4] In the absence of state law, there was no project.

The Federal Power Act stands in stark contrast to the Reclamation Law. The FPA is a regulatory statute, in the tradition of the Interstate Commerce Act of 1887, 24 Stat. 379 (1887) (which established the Interstate Commerce Commission) and the Federal Trade Commission Act of 1914, 38 Stat. 717 (1914) (which established the Federal Trade Commission) and was a forerunner of the regulatory agencies of the 1930s. The purposes of the FPA were three-fold: (1) to promote hydroelectric power on federal lands and on navigable waterways controlled by the federal government; (2) to give preference to public entities such as municipalities

[4]The Turlock Irrigation District and Modesto Irrigation District do not receive any Bureau of Reclamation water.

in the use of the power; and (3) to capture for the government some of the economic rents of water power, first by charges to licensees and second by recapture provisions upon expiration of licenses. This pervasive regulatory scheme could and did provide protection in Section 27 for vested water rights established under state law. It had no room for supervening regulation of the projects by state administrative agencies.

The State of California would like to persuade this Court, with "revisionary zeal," *see California v. United States*, 438 U.S. 645, 693 (1978) (White, J., dissenting), to change the law, as it purportedly did in the *New Melones* case. But the State's premise is wrong. *New Melones* did not change the law; it restored to Section 8 the meaning it had from 1902 to 1958 and repudiated the apparent departures from that meaning appearing in dicta in the late 1950s. Until then federal-state relations under the Reclamation Law followed a familiar, well-worn path for more than 50 years from the Law's enactment in 1902—a path marked by milestones such as *Nebraska v. Wyoming* and *Gerlach*, in which the Court routinely rejected claims of federal supremacy and reaffirmed deference to state law mandated by Section 8 of the Reclamation Law. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

Only when patently insupportable claims under state law were advanced did this Court—unnecessarily—depart from deference to state law under Section 8. Thus in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), the petitioner, in a brazen attempt to evade acreage restrictions imposed by the 1902 Act, asserted that state law forbade such restrictions. Unfortunately, instead of giving the simple answer that Section 5 of the 1902 Act set forth a specific congressional directive that was intended to override any contrary provision of state law, the Court undercut Section 8 and its deference principle. The achievement of the *New Melones* case was to point out the unnecessary deviation from prior decisions represented by *Ivanhoe* and to restore the principle of deference embodied in Section 8.

The FPA has no comparable legal history. From the time this Court first spoke in 1946, in *First Iowa*, the Act has been characterized as a pervasive licensing and regulatory system administered exclusively by a federal agency. There is no occasion for this Court to re-examine the FPA because, unlike Section 8, its interpretation has been uniform and unbending in respect to the necessity of federal supremacy.[5] The Reclamation act did not preempt state law; with reclamation projects Congress intended the Bureau of Reclamation to accommodate state law. In stark contrast, the Federal Power Act was the product of a heated and bitter debate in which the need for power was balanced against the need for conservation by placing all projects governed by the act under the exclusive regulatory control of the Federal Power Commission. The role of conflicting state regulation was specifically addressed in the debate in Congress over the FPA and Congress deliberately chose to preempt such conflicting state rules by dividing control by subject matter and giving each entity final authority within its jurisdiction. *See First Iowa*, 328 U.S. at 167-68. Congress decided to protect against the risk that states would veto projects that satisfied federal requirements. *See id.* at 164. Thus, the FPA is not an example of legislation where Congress' preemptive intent was unclear; Congress clearly chose for federal authority to preempt overlapping state regulation.[6] The states and their

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[5]This Court has repeatedly relied on *First Iowa* to reaffirm that the FPA preempts all state regulation of hydroelectric power projects licensed by the FERC. *See* Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 223 n.34 (1983); New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982); *see also* Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 773 (1984). These recent rulings simply carry forward this Court's longstanding and consistent interpretation of the FPA ever since its ruling in *First Iowa*. *See, e.g.*, FPC v. Union Electric Co., 381 U.S. 90, 97-99 (1965); Sperry v. Florida, 373 U.S. 379, 385 & n.4 (1963); Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 334 (1958); Federal Power Comm'n v. Oregon, 349 U.S. 435, 444-45 & nn.15, 16 (1955).

[6]The evidence of preemption is clear in this case. The Court in *First Iowa* reviewed the language and legislative history of the Federal Power Act and concluded that Congress intended "to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation . . ." 328 U.S. at 181. The Court thereby distinguished the FPA from the Rivers and Harbors legislation cited by the State in its

agencies have ample opportunity to voice their concerns through appearances before the Commission, and through their continuing authority over the proprietary matters as discussed by the Court in *First Iowa*.

The State's position in this case comes down to a naked assault on established, heretofore unchallenged law. *New Melones* offers no comfort, for it *restored* the Reclamation Law's historical meaning by reaffirming the first 50 years of interpretation of that Law. Yet the State would use *New Melones* to overturn 40 years of settled interpretation and administration of the FPA. In short, the State would expand *New Melones* beyond recognition in order to gain control over hydroelectric projects—a control that Congress never intended the states to have and that no court has ever validated.

III.

CALIFORNIA'S POSITION MAKES NO PRACTICAL SENSE AND DOES NOT NECESSARILY LEAD TO GREATER PROTECTION OF FISHERIES

California argues in this action that it has exclusive authority to regulate minimum project flows at a FERC-licensed hydroelectric facility in order to impose more stringent requirements on the operator than FERC has imposed. California implies in its Petition that such exclusive regulation of flows by the states is workable, does not infringe upon the FERC's prerogative, and will lead to greater protection of fish. Yet, in fact, California's proposed "state preemption" makes no practical sense, directly infringes on the regulatory prerogative that Congress intended FERC to exercise, and

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Petition for the proposition that federal and state authorities have dual authority over matters in navigable waters. *See* Pet. 19-20. The Court concluded that, "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. There is no question that regulation of project releases—the point of dispute in the instant case—is an integral part of FERC's regulatory task under the FPA. Therefore, it is clear that California's conflicting proposals must give way under established preemption doctrine.

merely transfers final decisionmaking authority from FERC to the states without any assurance that states will be any more or less protective of fish than the FERC.

A. California's Interpretation Of The FPA Is Unworkable.

Both Congress and this Court recognized the practical problems that inhere in a system in which two separate decisionmaking entities have the right independently to set the parameters for operation of hydroelectric projects. California here is advocating precisely the veto power and overlapping jurisdiction that Congress sought to eliminate with the comprehensive program of federal regulation created in the Federal Power Act. The Court construed the FPA in *First Iowa* as preemptive of state laws that conflict or interfere with the FPC's regulatory authority at FPC-licensed projects precisely to prevent a state from exercising a veto: "Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." 328 U.S. at 164. The Court stated: "A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad." *Id.* at 168.

California attempts to gloss over the unworkability of state regulation of FERC project flows by arguing here that it is not interested in obtaining veto power over FERC-licensed projects. *See, e.g.*, Pet. 23-24. The State argues that it is not infringing on FERC's prerogative when it sets more stringent conditions than FERC, Pet. 24, an argument which the Ninth Circuit rejected as, in effect, a veto of the project. 877 F.2d at 749; Pet. App. A-12. Veto, in the sense of "forbid," may not be the State's usual objective, but displacement of any other authority certainly is. When FERC sets 100 cfs of water for fish, it is simultaneously assuring the availability of the remaining supply for other uses. When the State Board sets 200 cfs for fish, it is allocating 100 cfs less

for other uses than FERC ordered. The basic mistake of the State's thinking is revealed in the statement that the State has set more stringent conditions and hence there is no conflict between the State Board's order and FERC's order. The test is not how stringent are the requirements for fish; rather, conflict occurs because of differences between the State Board and FERC over amounts of water allocated for different uses. The State Board's more stringent requirement for fish is an invasion of FERC's requirements for power. Each state agency has had the opportunity to fight out before FERC the amount of water to be released for fish. The fight is a charade if, after losing, the state agency imposes its desires anyway.[7]

This Court clearly recognized in *First Iowa* the same ploy attempted here by the State of California: "Compliance with State requirements that are in conflict with federal requirements may well block the federal license." 328 U.S. at 167. Congress intended for FERC to draw the line in setting conditions for operation of hydroelectric facilities, between environmental requirements and economic feasibility.[8] Yet the position the State of California is advocating here effectively makes all terms and conditions of FERC licenses superfluous because the State can specify its own construction conditions and operating conditions. Obviously, neither Congress nor this Court envisioned states playing such a role at FERC-licensed projects.

[7] *Amici* American Rivers, et al. contend that imposition of state-mandated minimum flows at FERC licensed projects is analogous to Army Corps of Engineers participation in regulating water pollution at hydroelectric projects. Brief of Amici Curiae American Rivers et al., at 17-18. Such Army Corps participation is the result of Congress' "radical change in legislative policy" wrought in the Federal Water Pollution Control Act Amendments of 1972, *see* Monongahela Power Co. v. Marsh, 809 F.2d 41, 45 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987), and sheds no additional light on Congress' intent in the entirely separate legislation at issue in this case—the FPA—which this Court definitively construed in *First Iowa*.

[8] Indeed, FERC concluded in this case that the state's recommended minimum flows would jeopardize the economic feasibility of the Rock Creek project by causing "Rock Creek to suffer an extended span of substantial financial loss during the license term." Pet. App. A-20 to A-21.

Unlike FERC, the states are not charged with balancing the need for power against the need for promotion of fisheries. If FERC is construed as having exclusive control over power, and the State has exclusive jurisdiction to promote fisheries, no agency will ever balance these interests.

B. State Regulation Of Stream Flows At FERC-Licensed Projects Will Not Lead To Greater Protection And Enhancement Of Fish.

California also tries to make its extreme position palatable by implying that exclusive state authority over stream flows will lead to greater protection and enhancement of fish for recreational and commercial purposes. California suggests in its Petition that the purpose of its more stringent minimum flow requirements for the Rock Creek project is to protect trout, a recreational fish. Pet. at 3. Nevertheless, the State's proposed interpretation of the FPA will not necessarily operate to advance greater protection and enhancement of fish either within or outside California.[9]

The State's interpretation of the FPA would simply shift decisionmaking prerogative from the FERC to the states; yet Congress specifically left the final decision with FERC in enacting the Electric Consumer Protection Act of 1986, Pub.L. No. 99-495, 100 Stat. 1243, which amended portions of the FPA. Such a shift would not necessarily lead to enhanced fishery protection. The FERC is equally obligated by a host of laws and regulations to protect fishery resources. Such concerns are an integral factor in its decision to regulate minimum flows. The fact that the State is unhappy in this particular instance with the FERC's resolution of such issues is not sufficient reason to upset the entire system of federal regulation.

[9] *Amici* American Rivers et al. advance a different, result-driven, argument that ignores the terms of the FPA and Congress' intent. They contend that the level of minimum project flows that most promotes fisheries, set either by a state or by FERC, should apply to FERC projects. *Amici* Brief, at 6. The American Rivers position fails to balance the need for power with the need to promote fisheries; it would authorize a state to divert water to fish that the FERC would use for power. Such state authority could be used to render impracticable any FERC project.

Indeed, the rule advanced by California here could easily result in less protection for fish, particularly in states other than California that may have fewer resources to allocate to protect fish and less inclination to weigh the balance in favor of fish over people and economic development.

Thus, the State of California's interpretation of the FPA is cumbersome and unworkable because of the state veto problems recognized by Congress and this Court. In addition, the State's position will not necessarily advance and may well hinder the protection and enhancement of the nation's fishery resources. In short, the State's position is contrary to Congress' intent, reflects bad policy and should be rejected.

The State makes no bones about the broad objectives it has in seeking to overturn *First Iowa* in this litigation. Its aims are not confined to low-head hydroelectric projects. The principal objective of the State is to oust FERC from a meaningful role in the licensing and oversight of all hydroelectric power projects—proposed and existing—and replace the federal agency with the State Board. Once this power play has been effectuated, the State Board will invoke the public trust as announced by the California Supreme Court in *National Audubon Society v. Superior Court*, 189 Cal. Rptr. 346, 33 Cal. 3d 419, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977 (1983). Relying on the public trust, which arguably reaches every trickle of water in the state and perhaps the snowpack as well, the State Board means to rewrite the FERC licenses to its own taste, without regard to bond obligations, federal recapture rights, or FERC orders designed to implement a comprehensive plan for the development of federal waterways. This is not even a "dual" system of control—water cannot be released at 100 cfs and at 200 cfs at the same time. A single authority must decide how much water goes to fish, how much to power and other uses. The State of California claims that authority in this case, but Congress and this Court lodged the power in FERC, where it should remain.

IV.
CONCLUSION

California's petition for a writ of certiorari should be denied.

November 1989.

Respectfully submitted,

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No. 89-333

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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OCTOBER TERM, 1989

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STATE OF CALIFORNIA,
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v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF THE ISSUE

The issue presented by the petition is whether a state agency has the power to override license conditions established by the Federal Energy Regulatory Commission for hydroelectric projects that are subject to the Commission's jurisdiction under Part I of the Federal Power Act.

INTEREST OF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies.[1] Its members serve 96 percent of all customers served by the investor-owned segment of the industry and 74 percent of all ultimate customers of electricity in the United States. A large number of EEI's members rely, either directly or through power purchase agreements, upon hydroelectric power to supply their customers' needs and to operate their electric systems.

Over the years, investor-owned utilities have developed, operated and maintained large numbers of hydroelectric projects, and today operate approximately 366 such projects pursuant to licenses issued by the Federal Energy Regulatory Commission or its predecessor, the Federal Power Commission ("Commission" or "FERC"). Each of these licenses contains conditions governing the projects' construction and operation, which conditions have been fashioned by the Commission, in the exercise of its judgment, to reflect and reconcile sometimes competing water use considerations (such as fish and wildlife, aesthetics, recreation, water quality, power plant capacity and energy output). By balancing all of these considerations and tailoring appropriate license terms and conditions, the Commission is able to ensure that the public interest, as a whole, is served by projects that are allowed to proceed.

Petitioner's view of Part I of the Federal Power Act[2] is fraught with negative ramifications extending far

[1] Pursuant to Supreme Court Rule 36.1, letters from the parties consenting to the filing of this brief have been submitted to the Clerk.

[2] The original Federal Water Power Act, 41 Stat. 1063 (1920), was amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. §§ 791-823b (1958 ed.), and made Part I of the Federal Power Act. The substance of the original Federal Water Power Act was left largely intact. Part I is sometimes referred to herein as the "Act" or the "FPA."

beyond the obvious effect on the Rock Creek project. To construe Part I as petitioner suggests would be contrary to the systematic and orderly licensing process established by Congress, and would have a direct chilling effect on the willingness of private enterprise to devote investment capital to the development of hydroelectric projects. As both current and potential project licensees, EEI's members have a unique and vital interest in the preservation of FERC's comprehensive regulatory responsibility and related preemptive powers under the Federal Power Act. Accordingly, EEI supports the decision of the Ninth Circuit Court of Appeals and opposes the petition for writ of *certiorari*.

SUMMARY OF ARGUMENT

The Court should deny *certiorari* in this case because petitioner advocates a scheme of duplicative state and federal regulation that Congress, and this Court, properly rejected long ago as undesirable and unworkable. In the decision below,[3] the Ninth Circuit correctly found that: (i) the comprehensive scope of the Federal Power Act evidences congressional intent to preempt state regulation of jurisdictional hydroelectric projects, except for the limited proprietary exceptions specified in Section 27; (ii) this Court's dispositive decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*[4] (construing the Federal Power Act) was unaffected by its subsequent decision in *California v. United States*[5] (construing the Reclamation Act of 1902) because the two statutes serve different objectives and relate to fundamentally dissimilar federal programs; and (iii) allowing the Board to override the minimum flow rates prescribed

[3] *State of California, ex rel. State Water Resources Board v. Federal Energy Regulatory Comm'n*, 877 F.2d 743 (9th Cir. 1989) (hereinafter "*California v. FERC*").

[4] 328 U.S. 152 (1946) (hereinafter "*First Iowa*").

[5] 438 U.S. 645 (1978) (hereinafter "*California*").

in the license would constitute a "veto power" over the project approved by FERC because such a change would directly affect the project's ability to generate electricity, thereby jeopardizing its economic feasibility. None of petitioner's arguments merit this Court granting further review of these determinations by the lower court, which are all supported by the language of the FPA, judicial precedent and sheer logic.

The controlling decision in *First Iowa* reflects a painstaking analysis of the provisions the Federal Power Act, including an examination of its underlying purpose, its legislative history and its functional application by the Commission. That analysis led this Court to conclude that the restrictive reference in Section 27 to "the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" saves from federal preemption only those few state laws dealing with water rights of a proprietary nature.[6] In all other respects, Congress sought to "occupy the field" in the area of federally-licensed hydropower projects. This result is not only in accord with the plain language of Section 27, but is also the only interpretation that permits the regulatory scheme established by Congress in the FPA to operate in a rational and orderly manner.

During the more than forty years since *First Iowa*, this Court and Congress have had ample opportunity to change the result of that decision, but neither has done so. Whereas petitioner seems to argue that *First Iowa*

[6] Although initially making reference to that restrictive portion of Section 27 saving from preemption only state water laws relating to "water used in irrigation or for municipal or other uses," petitioner later discards that critical phrase from its discussion. Utilizing the expedient of omission, petitioner then improperly proceeds to argue that Section 27 was meant to save from preemption *all* state laws pertaining to water rights. (Petition, pp. 6, 15, 17).

was impliedly overruled by the 1978 decision in *California*, it neglects to mention that this Court has continued to cite *First Iowa* with approval. Moreover, *First Iowa* has been followed consistently and without conflict by three Circuit Courts of Appeal to determine the proper relationship between FERC's comprehensive regulatory authority under Part I and those state laws saved from preemption by Section 27. Not one of these lower courts has questioned the status, reasoning or result of that decision.

Finally, Congress has periodically addressed the regulatory scheme established under Part I, most recently in connection with the passage of the Electric Consumers Protection Act of 1986.[7] ECPA amended Part I of the FPA to make clear that FERC must give equal consideration during the licensing process to the protection and enhancement of fish and wildlife and must give due weight to the related recommendations of state and federal agencies. However, the ultimate authority to reconcile competing public interest concerns and to develop license conditions that are consistent with the purposes and requirements of the Act was left, as before, with the Commission. These ECPA amendments and the associated legislative history confirm that FERC's decision regarding the appropriate minimum flow regime to protect fish resources, as reflected in the Rock Creek license conditions, preempts the Board's effort to impose a different requirement on the project.

[7] Pub. L. No. 99-495, 100 Stat. 1243 (Oct. 16, 1986) (hereinafter "ECPA").

ARGUMENT

I. THE NINTH CIRCUIT PROPERLY FOUND THAT CONGRESS INTENDED THE COMMISSION'S LICENSE CONDITIONS TO CONTROL

A. The Comprehensive Regulatory Scheme of Part I Leaves No Room for Conflicting State Regulation of Minimum Flows

In order to determine how Congress intended to divide regulatory authority over hydroelectric projects between the states and the federal government, the Ninth Circuit undertook a traditional preemption analysis that focused on the FPA as a whole, as opposed to examining individual sections of the Act in isolation. *See, e.g., Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 403 (1975) ("[T]heir assertion . . . is refuted when § 4(e) is read together with the rest of the Act as, of course, it must be."). This approach is necessary because preemption may be either expressed (explicitly stated in the statute's language) or implied (implicitly contained in the statute's structure and purpose). Even where Congress has not entirely displaced state regulation in a particular field, a conflict with federal law exists: (i) when it is impossible to comply with both state and federal law; *or* (ii) where the state law stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S. Ct. 1145, 1150-1151 (1988) (quoting *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987)). The Ninth Circuit's examination of various provisions of the FPA led it quickly to conclude that "[t]he weight of the comprehensive planning authority and the individual powers assigned to support that authority falls quite heavily on the side of federal exclusivity". *California v. FERC*, 877 F.2d at 747 (analyzing the Commission's powers and responsibilities under Sections 4(e), 4(f), 4(g), 5, 6, 7(a), 10(a), 13, 14(a), and 21 of the Act).

The determination of federal preemption by the Ninth Circuit is entirely consistent with a host of decisions by this Court identifying the purposes and objectives of the FPA. As explained in *Federal Power Commission v. Union Electric Co.*:

> The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious.

381 U.S. 90, 98 (1965) (footnote omitted). Thus, the FPA was intended to provide

> . . . a method by which the water powers of the country, wherever located, [could] be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. . . . The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies.

First Iowa, 328 U.S. at 180-81 n.23 (quoting statement by David F. Houston, Secretary of Agriculture, quoted in H.R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1920)).[8]

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[8] *See also New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) ("national concern for planning, development, and comprehensive utilization of the country's water resources"); *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. at 404 n.8 (development of water power to satisfy the requirements of a growing economy); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 23 (1952) ("the Commission is plainly made the guardian of the public domain"); *First Iowa*, 328 U.S. at 171 ("a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation").

In many respects, the Commission's comprehensive balancing authority under Section 10(a) of the FPA constitutes the heart of federal regulation over the development of hydroelectric projects. 16 U.S.C. § 803(a); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. at 22-23; *Federal Power Comm'n v. Union Elec. Co.*, 381 U.S. at 100-01; *California v. Federal Power Comm'n*, 345 F.2d 917, 923 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965). The Commission serves as the guardian of the public interest because no license for a hydroelectric project shall be granted unless, *in the judgment of the Commission*, that project is best adapted to a comprehensive plan for: (i) improving or developing a waterway for the use or benefit of commerce; (ii) the improvement and utilization of water power development; (iii) the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat); (iv) irrigation; (v) flood control; (vi) water supply; (vii) recreation; and (viii) other beneficial public uses. *See* Sections 4(e) and (10)(a), 16 U.S.C. §§ 797(e), 803(a). Under this mandate, FERC must "consider the whole picture" and exercise its judgment to determine whether and under what conditions a project license will issue.[9]

As part of its evaluation of the Rock Creek project, the Commission had to decide how much water flow must

[9] The Commission's regulations implementing Part I further manifest the comprehensive nature of federal control over hydropower projects within its jurisdiction. *See, e.g.*, 18 C.F.R. § 4.41 (outlining studies required as part of a license application). Of particular relevance to the case at hand is the required statement concerning the operation and utilization of the project, including detailed information on the establishment of minimum stream flows. These flows necessarily impact plant capacity and output. 18 C.F.R. § 4.41(c). An applicant must also provide an extensive environmental report containing, among other things, a report describing the fish, wildlife and botanical resources in the vicinity, the expected impacts of the project on those resources, and any proposed mitigation, enhancement and protection measures. 18 C.F.R. § 4.41(f).

be left in Rock Creek for fishery protection and other purposes ("minimum flows"), as opposed to being diverted, passed through the powerhouse and then returned to its original course at a point down stream. *California v. FERC*, 877 F.2d at 744. This determination had a direct bearing on the underlying decision to issue the license, because every drop of water required for minimum flows would be unavailable for power generation. An applicant must be able to demonstrate that a proposed project is economically feasible, or else the license will be denied. *See, e.g., Robert P. Wilson*, 28 F.P.C. 571, 574 (1962). In this instance, the Commission concluded that the water remaining for power production, after allowing adequate minimum flows to protect fishery resources, was sufficient to make the project financially sound. Having struck this balance, the Commission issued a license conditioned accordingly.

To allow the Board to override the Commission's judgment by prescribing a minimum flow regime different (either higher or lower) from that established by FERC would be to vitiate the comprehensive authority that Congress specifically entrusted to the Commission under the Act. Moreover, the stated reason for the Board's action (protection of trout resources) is among the enumerated considerations that the Commission is required to weigh in determining whether a project is in the public interest. Under these circumstances, the state law that petitioner seeks to enforce clearly and directly conflicts with the federal regulatory scheme, and thus was properly found by the Ninth Circuit to be preempted.

B. The 1986 ECPA Amendments to Part I Confirm the Commission's Exclusive Authority To Establish Minimum Flows That Are Appropriate To Protect Fish Resources

Through amendments to Part I under ECPA, Congress has recently confirmed the Commission's exclusive

role in establishing appropriate license conditions, in particular conditions setting minimum flows designed to protect and promote fish and wildlife resources. Section 10(a) of the Act was amended to make clear that the protection of fish and wildlife (including related spawning grounds and habitat), irrigation, flood control and water supply are among the many public interest considerations that the Commission must balance pursuant to its comprehensive regulatory authority. An amendment to Section 4(e) also clarified that environmental aspects of a proposed project must be given "equal consideration" in that balancing process. Finally, Congress directed the Commission to give consideration to the recommendations of state and federal fish and wildlife agencies. If such recommendations are not incorporated in the license, Section 10(j) now requires the Commission to make a specific finding that such recommendations are inconsistent with the purposes and requirements of the Federal Power Act and that the license conditions FERC has adopted in lieu of those recommendations adequately protect fish and wildlife. 16 U.S.C. § 803(j).

The ECPA amendments described above are significant because they evidence congressional intent opposite to that suggested by petitioner. If, as a consequence of Section 27, individual state agencies were truly free to impose their own minimum flow requirements in the name of fish protection, then Congress would not have gone to the trouble of etablishing these new statutory obligations, in particular Section 10(j). Indeed, a state agency would not have to bother to submit its recommendations to the Commission at all if Section 27 saved from preemption state laws pursuant to which that agency could at any time impose its wishes directly on the project licensee. Congress was well-aware of the existing case law on this subject (including *First Iowa*), and did

nothing to change the outcome of those decisions when it enacted ECPA.[10]

The legislative history pertaining to ECPA further emphasizes the Commission's dominant authority to establish conditions under which FERC-licensed hydroelectric projects will operate. Senator McClure, chairman of the ECPA conference committee, confirmed the Commission's continued role as sole arbiter of competing public interest concerns when he stated that "[n]either [the Senate nor the House] considered giving the fish and wildlife agencies the same type of mandatory conditioning authority which they have under section 30(c) for exemptions. *Neither did either body want in any way to interfere with the role of FERC in balancing competing values.*" 132 Cong. Rec. S-15384 (October 6, 1986) (emphasis added). Another member of the conference committee, Senator Johnston, expressed the same forceful view of FERC's exclusive authority to establish appropriate license conditions:

> By [including the phrase "equal consideration" in amended Section 4(e)] we made it clear that FERC must consider fish and wildlife needs equally with the development purposes for which licenses are is-

---

[10] Immediately prior to passage of the Senate version of ECPA, an amendment to Part I was introduced designed to give individual states greater control over appropriation, diversion and use of water by FERC licensees. 132 Cong. Rec. S-4448-49 (April 17, 1986). The amendment was withdrawn on condition that the Senate Committee on Energy and Natural Resources hold a hearing to examine the suggestion, which it did on September 12, 1986. In the end, no amendments along these lines resurfaced and the Commission's licensing jurisdiction was left fully intact. This history confirms the correctness of the Supreme Court's conclusions in *First Iowa*, and also evidences Congress' satisfaction with the Commission's exercise of its jurisdiction pursuant to that decision. *See, e.g., Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. at 410; *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982).

sued. However, the amendment to section 4(e) also makes clear that while full and genuine consideration of fish and wildlife is required, equal treatment is not. Instead, *the reconciliation of power and other development needs with fish and wildlife needs in cases of conflict is ultimately left to the public interest judgment of the Federal Energy Regulatory Commission.*

132 Cong. Rec. S-15107 (October 3, 1986) (emphasis added).

The ECPA amendments reaffirmed the scope of FERC's authority.[11] Congress, then as now, intended for the Commission to have exclusive authority to balance and, when necessary, to reconcile the various interests competing for the use of the waterway.

II. THE NINTH CIRCUIT PROPERLY FOLLOWED THIS COURT'S DECISION IN *FIRST IOWA*

Although independently evaluating the preemptive effect of the operative provisions of the FPA, the Ninth Circuit clearly recognized and followed this Court's decision in *First Iowa*, particularly as it related to the congressional intent underlying Section 27. *California v. FERC*, 877 F.2d at 747-50. In an effort to evade that dispositive precedent, petitioner alternatively argues that *First Iowa*'s analysis of Section 27 is *dictum*, or that the

[11] Even before the enactment of ECPA, the Commission had evidenced a clear understanding that its comprehensive regulatory responsibility entailed the careful balancing of a wide range of public interest considerations, among which were the same environmental and wildlife concerns cited by the Board as the basis for its proposed minimum flows. *See, e.g., Rocky Mountain Power Co.*, 37 F.P.C. 329 (1967); *Public Util. Dist. No. 1 of Skamania County, Washington*, 32 F.P.C. 444, 450 (1964); *Robert P. Wilson*, 28 F.P.C. 571 (1962). After ECPA, the Commission's analysis of environmental factors has become even more detailed. *See, e.g., Joseph M. Keating*, 42 F.E.R.C. ¶ 61,030 (1988).

decision "conflicts" with this Court's subsequent decision in *California*. Petitioner's arguments on both points are without merit.

Contrary to the wishful characterizations repeatedly offered by petitioner, the interpretation of Section 27 in *First Iowa* was not gratuitous "dictum," but instead was a necessary and integral part of the fundamental analysis. (Petition, pp. 5, 9, 10). To determine the role left to the states in the area of hydroelectric development, this Court was required to discern the intent of Congress in both Section 9(b) (now Section 9(a)(2)) and Section 27, and to reconcile those sections with the other provisions of the regulatory scheme Congress had established. After a careful examination of Part I and the underlying legislative history, this Court described the role of Section 27 as follows:

> [C]ongress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the states so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, *without setting up a divided authority over any one subject.*
>
> Sections 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act.
>
> • • • •
>
> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights.
>
> • • • •

> This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.

328 U.S. at 174-76 (supporting footnotes omitted, emphasis added). "Construing section 27 and other parts of the FPA was essential to the [Supreme] Court's preemption analysis of section 9(b)" and, for this reason, the Ninth Circuit properly noted that "[d]ismissing *First Iowa*'s comments on Section 27 as *dicta* is improper." *California v. FERC*, 877 F.2d at 749.

The Ninth Circuit's reliance on the reasoning and result of *First Iowa* for substantive guidance in interpreting the FPA was well-placed. To allow the Board to override FERC's judgment regarding duplication of two authorities over the same subject matter was condemned by this Court as totally unworkable. *First Iowa*, 328 U.S. at 171. Part I instead reflects an integration of state and federal power that has resulted in a smoothly functioning division of regulatory authority. *First Iowa*, 328 U.S. at 171; *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 445-46 (1955); *Pennsylvania Dept. of Env'n Resources v. Federal Energy Regulatory Comm'n*, 868 F.2d 592, 599-600 (3d Cir. 1989); *Town of Springfield, Vt. v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 453 F.2d 463, 479-80 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *Portland Gen. Elec. Co. v. Federal Power Comm'n*, 328 F.2d 165, 176 (9th Cir. 1964); *Washington Dep't of Game v. Federal Power Comm'n*, 207 F.2d 391, 395-96 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

Nor is there any merit to petitioner's suggestion that the decision in *California* (construing the Reclamation

Act of 1902) conflicts with or implicitly overrules *First Iowa*. In the Reclamation Act, Congress did not implement a comprehensive scheme and therefore left room for the operation of some state regulation. In the Federal Power Act, however, the federal government exercised jurisdiction by establishing a specialized agency with plenary control and authority to evaluate hydroelectric projects within the agency's jurisdiction in light of comprehensive criteria. Moreover, this Court has continued to cite *First Iowa* with approval even after its decision in *California*. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. at 338 n.6.

Furthermore, there is no conflict among the circuits concerning the continued validity of the reasoning and rationale underlying *First Iowa*. In *Town of Springfield v. McCarren*, *supra*, the court carefully compared the extent to which federal authority was exercised under the Reclamation Act as compared to the Federal Power Act, concluding that the two statutes "serve different objectives, and relate to federal actions fundamentally dissimilar in nature." *Id.* at 1154. Under such circumstances, state regulation was found to be foreclosed by the FPA. *Id.* at 1156. The Ninth Circuit specifically agreed with that assessment of the differing preemptive effect of the two statutory schemes, and therefore found no tension at all between this Court's decisions construing them. *California v. FERC*, 877 F.2d at 749.

Just recently, the Third Circuit has joined the Second and Ninth Circuits in following the interpretation of Section 27 found in *First Iowa*. The court stated:

> The Federal Power Act does not permit interference with certain state laws relating 'to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature.'

> However, the state law provisions relating to pollution, flood control, aesthetics and recreation, and natural resource conservation, that [the state agency's] license affects, do not fall within this narrow class.

Pennsylvania Dep't of Env'n Resources v. FERC, 868 F.2d at 598 (citations omitted).

If petitioner's Reclamation Act argument had any substance at all, then surely one of the three circuit courts that have directly considered the proper relationship between Section 27 of the FPA and state water laws would have perceived this alleged conflict. None has done so. Instead, each of these courts has embraced *First Iowa* without question or criticism.

III. THE NINTH CIRCUIT PROPERLY REJECTED THE BOARD'S EFFORT TO USURP THE COMMISSION'S POWER TO BALANCE AND RECONCILE COMPETING PUBLIC INTEREST CONSIDERATIONS

Beyond the fact that FERC's affirmative exercise of its statutory authority preempts the Board's consideration of the same minimum flow/fishery resources issue, there are compelling practical and policy reasons why petitioner's attack on the Commission's authority to establish binding license conditions must fail. Under the mandate of Congress, and in particular Section 10(a), FERC's analysis of the public interest is multi-faceted, and the license conditions produced by its deliberative process are required to serve the public interest as a whole. In contrast, individual state agencies often will have a narrow, single-issue focus, and thus may disregard other equally important aspects of a project. Such agencies may simply lack the broad expertise, possessed by FERC and its staff, that is needed to review and appreciate other water resource values. For whatever reason, there is certainly no assurance that their decisions will

recognize, let alone serve, the broad public interest that the Commission is required to guard.

The danger of considering aspects of the public interest on a piecemeal rather than a unified basis is typified by the Board's astounding assertion that the higher minimum flow requirements it desires do not "conflict with the FERC flow requirements, because the state requirements are more stringent." (Petition, p. 24). This simplistic analysis ignores the fact that releasing more water for greater minimum flows in Rock Creek necessarily diminishes the power value of the hydroelectric project. As explained by the Commission in its decision below:

> In considering and balancing all aspects of the public interest as we are required to by Section 10(a) in determining whether, and under what conditions, a license should issue, we must balance, *inter alia*, the need to protect environmental interests with the need for the power to be produced by the projects. In so doing, we prescribe conditions, such as those relating to minimum flow releases, that we believe will provide the appropriate level of environmental protection and energy generation and will not issue a license if the conditions we deem necessary to protect environmental resources would render a project economically infeasible.
>
> Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by WRCB, would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state. By imposing higher minimum flows than prescribed in a license, a state could require greater environmental protection than we determined necessary and could

> cause a project to become economically infeasible. Conversely, by imposing lower minimum flows than prescribed in a license, a state could require the operation of a project providing less environmental protection than we found necessary in issuing the license.

Rock Creek Limited Partnership, 41 F.E.R.C. ¶ 61,198, p. 61,515 (1987).

Were individual state agencies to be given the authority proposed by petitioner, they would each have the power to impose in effect an economic veto on a proposed project or, perhaps even worse, to render a licensed project economically infeasible after it has been constructed. Furthermore, a state agency could disregard important national objectives of Congress. Either way, petitioner's position is untenable and its approach unworkable.

Practically speaking, there can be only one decision-maker respecting the operating conditions of a licensed project—a single decision-maker charged with the responsibility of protecting the interests of everyone and authorized to make the necessary "judgment calls" involved in that balancing process. Suppose, for example, a licensed storage project were to be built near a state line, with the reservoir located primarily in one state and the dam and tailrace areas located in the other. Under petitioner's view of the Federal Power Act, which state's concerns would dominate: the one where the reservoir is located (perhaps most interested in seasonal elevations, recreation and shoreline aesthetics), or the state where the dam and tailrace are located (perhaps most interested in safety and the downstream needs of fish and wildlife)? Where does the license applicant go to avoid being caught in the middle of the resulting "tug of war," as equally-matched agencies within those two states strive to protect their respective, competing parochial concerns? The obvious answer to such jurisdictional chaos is a single national authority—the Commission.

CONCLUSION

The Ninth Circuit recognized that the dual regulatory approach advocated by petitioner would be totally unworkable, and would expose hydroelectric project licensees to conflicting directives from multiple decision-makers. Under the Federal Power Act, the Commission is directed to balance *all* aspects of the public interest to determine whether a license should issue and under what conditions the project should operate. This is the orderly regulatory scheme established by Congress; it is the only process that will work. The petition for a writ of *certiorari* is without merit, and should be denied.

Respectfully submitted,

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No. 89-333

IN THE

Supreme Court of the United States

October Term, 1989

State of California,

Petitioner,

v.

Federal Energy Regulatory Commission, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE, AMERICAN PUBLIC POWER ASSOCIATION, IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus curiae, the American Public Power Association ("APPA"),[1] is a national service organization representing approximately 1,750 publicly-owned local electric utilities in 49 states, Puerto Rico, the Virgin Islands, Guam and American Samoa. APPA members include state agencies, cities, towns, and water storage and irrigation districts; nearly all of its members qualify as "municipalities" under section 3(7) of the Federal Power Act ("FPA"), 16 U.S.C. § 796(7). Many APPA members own and operate projects licensed by the Federal Energy Regulatory Commission ("FERC" or "Commission"); some are in the licensing or relicensing stages. Other members are dependent upon power production from FERC licensed projects.

[1] As required by the Court's Rule 36.1, written consent has been obtained from the parties to the filing of this brief amicus, and has been lodged with the Clerk.

If this Court were to accept the State of California's invitation to overrule *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), the ramifications on APPA's membership and the entire electric utility industry would be substantial. For over 40 years, the industry has conducted hydroelectric power operations and power resources planning activities in reliance on *First Iowa*'s determination that FERC is the ultimate regulatory authority over water power development affecting interstate commerce. To overrule that decision now would cause hydroelectric power operations to be subjected to 50 different state laws and to the idiosyncracies of each state's principles and criteria for using water.

SUMMARY OF ARGUMENT

There is no need for the Court to grant a writ in this case. There is no conflict in the opinions of this Court with the Court's opinion in the *First Iowa* case, found by the Ninth Circuit to be controlling here. Nor is there any conflict among the Circuits. Rather, there has been uniform recognition that Congress in the Federal Power Act established a Commission to avoid duplicative regulation of hydroelectric power production in order to achieve its substantial benefits. The petition should be denied.

ARGUMENT

In its opinion below, the Ninth Circuit held "that Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary [water] rights remains in state hands." *California ex rel. State Water Resources Board v. FERC*, 877 F.2d 743, 750 (9th Cir. 1989). The court agreed with FERC that the establishment of minimum bypass flows for hydroelectric projects is a regulatory matter within the Commission's comprehensive planning authority rather than one involving proprietary water rights under state law. In so ruling, the Court of Appeals was merely following a long and unswerving line of cases.

The issue raised by California is squarely controlled by this Court's 1946 decision in *First Iowa*. There, the Court rejected the argument that the Federal Power Act leaves the states with the power to regulate federally licensed projects. The Court held that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." 382 U.S. at 181 (footnote omitted). Section 27 of the FPA, 16 U.S.C. § 821, a "savings" provision which disclaims any intent to displace state water rights laws, was found to pertain only to proprietary water rights. *Id.* at 175-76.[2] The FPA does not give the states a veto power over licensed projects because "[s]uch a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." *Id.* at 164 (footnote omitted).[3] *See also id.* at 168 ("A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.... Conformity to both standards would be impossible in some cases and probably difficult in most of them.") (footnote omitted); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958) (calling the FPA a "detailed and comprehensive plan") (footnote omitted).

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[2] The present case does not involve rights to the use of water under state law, long known as "state water rights." While the present project does impact on state water laws, as would any river project, it does not affect any individual proprietary rights to water. Neither California nor any individual claims that the present hydroelectric project has adversely affected his/her claim to water. Thus, any attempt to turn this case into a water rights case under 27 must fail. This is an exercise by California to supercede FERC's duty to regulate licensed project water releases, in this case for fish.

[3] The dramatic change sought by California is clearly the exercise of a veto power. "Changing the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project." *California v. FERC*, 877 F.2d at 749.

First Iowa repeatedly has been relied upon not only by this Court but by other courts as well in cases involving the FPA and conflicting state regulation. *See Federal Power Comm'n v. Oregon*, 349 U.S. 435, 445 (1955) ("To allow Oregon to veto such use [of a river for a power project], by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision."); *Pennsylvania Dept. of Envtl. Resources v. FERC*, 868 F.2d 591, 598 (3d Cir. 1989) (state laws relating to pollution, flood control, aesthetics and recreation, and natural resources conservation do not fall within section 27's savings provision); *Board of Elec. Light Comm'rs of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983) ("In *First Iowa* ..., the Supreme Court held that the detailed provisions of the Federal Power Act left no room for conflicting or duplicative state regulations."); *Washington Dept. of Game v. Federal Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953) ("Consistent with the *First Iowa* case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States."); *Mega Renewables v. County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986) ("*First Iowa* clearly held that states (or in this case the county) may not impose permit requirements on federally licensed hydro-power projects."); *Town of Springfield, Vermont v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982) (collecting cases), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Town of Springfield, Vermont v. Vermont Envtl. Bd.*, 521 F. Supp. 243, 248-49 (D. Vt. 1981) (collecting cases). Other cases have relied upon *First Iowa* or cited it approvingly in a variety of situations. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983) (distinguishing *First Iowa* on the basis that the FPA is more comprehensive than the Atomic Energy Act); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 385 & n.4 (1963); *Georgia Power Co. v. Baker*, 830 F.2d 163, 165-66 (11th Cir. 1987); *Uncompahgre Valley Water Users Ass'n v. FERC*, 785 F.2d 269, 275 (10th Cir.) *cert. denied*, 479 U.S. 829 (1986); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1085 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980); *California v. Oroville-Wyandotte Irrigation Dist.*, 411 F. Supp. 361, 367 (E.D. Cal. 1975), *aff'd*, 536 F.2d 304 (9th Cir.), *cert. denied*, 429 U.S. 922 (1976); *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 836 (S.D. Cal. 1958). Such persistent and uniform reliance on *First Iowa* belies California's contention that the pertinent part of *First Iowa* was mere dictum.[4]

California contends that *First Iowa* and all of the cases relying on it have been undercut by *California v. United States*, 438 U.S. 645 (1978), which interpreted section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383. Such a contention is flawed in two crucial respects.

First, there are fundamental differences between section 8 of the Reclamation Act and section 27 of the FPA.

> In *California v. United States*, the Supreme Court dealt with a statute distinct in both purpose and history from that at issue in *First Iowa*. *First Iowa* had examined federal preemption of the *licensing of hydroelectric projects*. . . . *California v. United States* explored state and federal *authority over federal reclamation projects* . . . . Notwithstanding some similarity in the wording of the statutes, they serve different objectives, and relate to federal actions dissimilar in nature.

Town of Springfield v. McCarren, 549 F. Supp. at 1154 (emphasis supplied). Because the two cases dealt with dissimilar subjects, their holdings are not inconsistent. There is, however, one commonality between the two cases: "If there is one theme that runs through both *First Iowa* and *California v. United States*, it is that duplicative regulation is to be avoided." *Id.* at 1156. This is exactly what the Ninth Circuit avoided by its opinion in the present case.

Second, decisions by this Court issued after *California v. United States*, continue to treat *First Iowa* as good law. In 1982, in

---

[4] The long line of cases also belies California's contention that the preemption issue has been dormant and that with the increase in applications for FERC licenses since 1978, it has gained immediacy. Cert. Pet. 6 n.1. The cases show that the issue has not been dormant but rather has been conclusively and uniformly settled against conflicting state regulation.

New England Power, 455 U.S. at 338 n.6, the Court stated "New Hampshire's purported 'ownership' of the Connecticut River therefore provides no justification for restricting or conditioning the use of these federally licensed units. *See First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946)." *See also Pacific Gas*, 461 U.S. at 223 n.34 (comparing and contrasting *First Iowa* and the FPA and FERC with the Atomic Energy Act and the Nuclear Regulatory Commission). Lower federal courts also have continued to treat *First Iowa* as good law following *California*. *See Pennsylvania Dept. of Envtl. Resources*, 868 F.2d at 598; *Georgia Power*, 830 F.2d at 165-66; *Uncompahgre Valley Water Users*, 785 F.2d at 275; *Board of Electric Light*, 725 F.2d at 178; *Ventura County*, 601 F.2d at 1085; *Mega Renewables*, 644 F. Supp. at 499; *Town of Springfield v. McCarren*, 549 F. Supp. at 1154-57.

Thus, *First Iowa* remains valid and controlling law. Not only do courts continue to rely on this case, there are many projects which have been built or are planned, all of which have proceeded on the basis that they are subject to only one licensing authority.[5]

In its publication Water Power — Use Of A Renewable Resource (May 1988), the Commission estimated that the some 2,030 hydroelectric power plants operating in the United States as of January 1, 1988 had a total capacity of over 88,000,000 kilowatts. More than half of this capacity was developed by non-federal entities, and is regulated by FERC, pursuant to some 1,000 licenses issued under the FPA. Projects owned and operated by publicly-owned entities, such as the members of APPA, account for over 16,000,000 kilowatts of capacity.

[5] California raises the specter of different projects on the same river being subject to different regulations. Pet. Cert. 22. It does not, however, state how frequently this event occurs. Furthermore, the hypothetical fails to address the fundamental differences between hydroelectric projects and other types of river projects. Most importantly, the example implicitly assumes that FERC would not take into account all river uses when setting license conditions, as it must under a number of federal statutes including the National Environmental Policy Act, 83 Stat. 852, as well as the FPA, as amended most recently in the Electric Consumers Protection Act of 1986, 100 Stat. 1243. California provides no reason to believe its assumption has any basis in reality.

Applications pending at FERC as of September 30, 1988 for 150 major hydroelectric project licenses involved more than 3,600,000 kilowatts of new capacity. Also at that time some 465 preliminary permits either outstanding or applied for involved the feasibility of installing about 12,000,000 kilowatts of additional new capacity. FERC 1988 Annual Report at 14. The cost of developing the approximately 15,600,000 kilowatts of new capacity involved is estimated to be $31 billion.

The type of investment necessary to bring these and future proposals to fruition requires certainty with respect to water flow conditions to be imposed on the projects' sponsors. Similarly, owners of existing projects, who have long relied on the finality and certainty of their FERC licenses, cannot afford to have their embedded investments and power planning decisions subjected to the changing prerogatives of various single-purpose state agencies. For every cubic second-foot of water required to be bypassed for fish or other non-power values, the volume of water available for hydroelectric generation is correspondingly reduced. Stream flows are the lifeblood of any hydroelectric project; thus, the power to prescribe minimum bypass flows is the power to destroy a project's feasibility. If California were to prevail in the case at bar, existing as well as new licensees would be hostage to the fluctuating demands of narrowly focused state agencies at any time during the terms of their licenses.

This Court provided a necessary measure of certainty over 40 years ago when it confirmed that the FPA vests the Commission with final authority over all regulatory aspects of jurisdictional hydropower development, reserving to the states only those matters that pertain to the ownership of water rights for irrigation or for municipal or other uses. The Court of Appeals below correctly followed *First Iowa* and the long line of cases that have consistently adhered to that decision. There is no reason to revisit it.

CONCLUSION

Amicus APPA requests that the Court deny the petition for writ of certiorari.

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No. 89-333

In The

Supreme Court of the United States

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Under the Equal Footing Doctrine, the states acquired sovereign ownership and control of all navigable waters within their borders, subject only to the federal constitutional powers to regulate commerce and administer federal lands. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842). These sovereign state powers include the right to adopt state laws that provide for the allocation of water among competing users. *United States v. Rio Grande Dam and Irrigation District*, 174 U.S. 690, 702-703, 709 (1899).

Over time, the states have used their sovereign power over water to develop sophisticated management systems to control the distribution and use of water. Each state system is tailored to reflect local water availability and needs. In recognition of this fact, Congress has consistently and purposefully deferred to the primacy of state law in federal enactments affecting water allocation. *California v. United States*, 438 U.S. 645, 653 (1978).

The Federal Energy Regulatory Commission (hereinafter FERC or Commission), in its Order in Response to Request for Declaratory Order ("Rock Creek Order"), 38 FERC § 61,240 (March 11, 1987), and in its Order Denying Rehearing, 41 FERC § 61,198 (November 20, 1987), asserts that Congress intended to depart from its historical deference to state water law when it enacted the Federal Water Power Act of 1920.[1] FERC argues that it has been granted,

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[1] The Federal Water Power Act was subsequently incorporated in the Federal Power Act of 1935, 16 U.S.C. §791(a)-793, 795-818, 820-825(r) (1982 & Supp. 1986). These two acts will be collectively referred to as the "FPA".

under the FPA, exclusive jurisdiction over all aspects of private hydropower projects licensed under the FPA, including the setting of water flow rates at those projects. The United States Ninth Circuit Court of Appeals affirmed FERC's finding that the agency has exclusive control over the setting of water flows for hydroelectric power projects. 877 F.2d 743 (9th Cir. 1989).

The FERC orders and the affirming decision of the Ninth Circuit ignore both the express language of the FPA and the legislative history confirming Congress' intent to defer to state laws controlling water rights. The Ninth Circuit's decision enthrones FERC as the supreme authority over decisions related to control, appropriation and use of water at hydropower projects, a role never intended by Congress.

If the decision of the Ninth Circuit is allowed to stand, it will fundamentally alter state control of water resources and will eviscerate comprehensive state regulatory systems for allocating water. FERC's power over state water resources will come to supersede all state authority to regulate state water rights. Thus, the 43 Amici Curiae states have a significant interest in supporting California's petition and ask that the Court accept the case and reverse the lower court's decision.

ARGUMENT

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS RAISES AN IMPORTANT FEDERAL QUESTION.

The decision of the United States Ninth Circuit Court of Appeals in *California v. FERC* raises an important question of federal law which has not been, but should be,

settled by this Court. Sup. Ct. R. 17.1(c). The Ninth Circuit's interpretation of section 27 of the FPA ignores Congress' express intent to defer to state water law, thus dramatically altering the respective roles of the states and federal government in regulating private hydropower development.

The federal policy of deferring to state water law originated from the constitutionally-based equal footing doctrine. *California v. United States*, 438 U.S. 645, 654-55 (1978). Under the equal footing doctrine, the original thirteen states retained sovereign control over their navigable waters subject only to the federal power to regulate commerce and to protect federal reservations. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899). States subsequently admitted to the union acquired the same sovereign power over their navigable waters.

In keeping with the equal footing doctrine, Congress for over 200 years has refrained from impinging upon the states' authority to regulate water. As this Court noted in *California v. United States*, 438 U.S 645 (1978), Congress has continually opted for state regulation. "The history of the relationship between the Federal Government and the States in the reclamation of arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653.

Congress has routinely expressed its policy of deference to state water laws in statutes that touch upon the regulation of water. Public lands acts of the 1800's, for example, expressly deferred to state regulation of water

rights. *See* Mining Act of 1866, 14 Stat. 253, 43 U.S.C. § 661 (1982), and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 (1982). Similarly, the Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C. § 371 *et seq.* (1982), expressly required federal reclamation projects to comply with state water laws. Section 8 of the Act states:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the water thereof.

43 U.S.C. § 383.

Congress intended to carry this policy of express deference to state water law through to the Federal Water Power Act of 1920. Section 27 of the Act was taken almost verbatim from section 8 of the Reclamation Act of 1902:

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821. By its terms, section 27 recognizes a broad array of state regulation of water rights: control, appropriation, use, and distribution. It is hard to imagine a plainer expression of Congress' intent to defer to the regulatory authority of the states.

Despite Congress' express intent, the Ninth Circuit chose to narrowly read section 27 as limiting "state authority to the area of property rights involving water for irrigation, municipal use, and related activities." 877 F.2d at 747. Not only is such an interpretation unsupported on the face of the statute, it is contrary to general principles of preemption and of statutory interpretation. This misinterpretation of the FPA presents a significant federal question warranting review.

II. THE EXPRESS LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 27 OF THE FPA PRECLUDES PREEMPTION OF STATE AUTHORITY TO REGULATE WATER RIGHTS FOR PRIVATE HYDROPOWER PROJECTS LICENSED UNDER THE ACT.

A. The Ninth Circuit's Preemption Analysis Was Inappropriate.

"When Congress legislates in a field traditionally occupied by the states," preemption analysis must start "with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *California v. ARC America Corp.*, 490 U.S. ___, 109 S. Ct. 1661, 1665, 104 L.Ed.2d 86, 94 (1989). Since regulation of water is a field traditionally occupied by the states and since Congress deliberately and purposefully included a savings clause for state water law in the FPA, a fortiori there can be no clear and manifest intent to preempt state water law. Indeed, section 27 of the FPA gives rise to the opposite conclusion. As Justice Scalia stated in his concurring opinion in *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 295 (1987), a savings clause is best viewed as an "anti-preemption" provision.

When Congress enacts an anti-preemption provision, the proper inquiry irrespective of the pervasiveness of the federal statutory scheme, is to construe the statutory provision. *See Id.* at 296; *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986); *See also* L. Tribe, *American Constitutional Law*, 482-83, n.8 (2d Ed. 1988). Thus, the Ninth Circuit should have construed the language of section 27 rather than engaging in preemption analysis.

B. Statutory Construction of Section 27 Demonstrates That Congress Intended to Defer to State Water Laws.

Proper analysis of an anti-preemption clause must begin with ordinary canons of statutory construction. A well-established rule of statutory interpretation obliges a court to give effect, if possible, to every word or clause Congress used. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The Ninth Circuit interpretation that section 27 defers solely to proprietary rights under state law fails to give effect to the clause of section 27 deferring to the states' regulatory authority, thus violating this fundamental canon of construction.

If Congress had intended to limit section 27 to proprietary rights, it would have been sufficient to simply disclaim any intent to interfere with vested water rights. Instead, Congress expressly deferred to state laws "relating to the control, appropriation, use, or distribution of water . . . *or* any vested right acquired therein." The sentence contains two clauses referring to separate aspects of state water law, connected by the disjunctive

"or." The first clause refers to state laws regulating "control, appropriation, use or distribution of water." These are well-established terms of art relating to state regulation of water rights. The second clause refers to state laws vesting water users with a protectable property interest. The Ninth Circuit, by interpreting section 27 to protect only vested property interests, rendered the first clause of the sentence a nullity.

Another canon of construction is that terms connected by a disjunctive should be given separate meanings, unless the context dictates otherwise. *Reiter v. Sonotone Corp.*, 442 U.S. at 339. Thus, the second clause recognizing vested property rights cannot be properly read to modify the first clause deferring to state laws relating to the control, appropriation, use or distribution of water. A proper construction of section 27 is that the disjunctive "or" between the two phrases is intended to preserve both aspects of state law. A review of the legislative history confirms this interpretation.

C. Legislative History of Section 27 Demonstrates That Congress Intended to Defer to State Water Laws.

Congress debated the subject of hydropower legislation during several sessions, beginning in 1914 and ending with enactment of the FPA in 1920. The congressional debates demonstrate that Congress did not intend to preempt state water laws, but instead, specifically provided for their application.

The predecessor of section 27 is contained in section 14 of H.R. 16673, a hydropower bill introduced in 1914.[2] Congressman Edward Taylor of Colorado, who authored section 14, which is virtually identical to section 27 of the FPA, stated that:

> A power company [under section 14] must come in and put itself on the same footing and equality with other appropriators of water and make an appropriation under our laws so that those that are ahead will be ahead of water-power companies authorized under this act; and those who are behind will be behind the new power company; in other words, *they will have to come in on an equality with all other water users and acquire and use their water rights under our State water-right laws* and under the acts of Congress and laws by which those rights were acquired.

51 Cong. Rec. 14071 (1914) (emphasis added).

When Congress resumed the debate over hydropower development in the sixty-third Congress, a new hydropower development bill was introduced. This bill also contained language similar to section 8: "[N]othing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water." S. Rep. No. 66, 64th Cong., 1st Sess. 3 (1916). The Senate Committee on Public Lands expressed its intent regarding this language:

---

[2] Section 14 provided: "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder." H.R. Rep. No. 842, 63d Cong., 2d Sess. 4 (1914).

> This bill in no way seeks to encroach upon, impair, or destroy any rights of the States. It is not intended in any wise or in any degree to trench upon the right of the State to control of the water flowing in the streams within its borders. *It is framed upon the distinct theory that the State owns and controls the use of the water flowing within the streams within its boundaries, and that the Federal Government owns and has the right to control and dispose of the public land bordering on and adjacent to such streams.*

Id. at 4-5 (emphasis added). The Committee's report concluded:

> *[T]he States alone cannot facilitate water-power development nor provide legislation sufficient therefor, because the States control only the water.* It takes land as well as water in such cases to develop power. On the other hand, *the Federal Government alone cannot furnish the facilities for the development of power, for the Federal Government owns only the land,* and it takes water as well as land to develop power. *Each must contribute its share. The Federal Government must contribute the use of land, and the State government must contribute the use of water. . . .*

Id. at 5 (emphasis added). Thus, the Senate report made clear that, although the federal government controls the land for hydropower projects, the states control the water rights. Once again, however, the Congress failed to pass a hydropower development act.

In December, 1918, President Woodrow Wilson attempted to break the deadlock over hydropower legislation. His efforts resulted in the introduction of S. 1419, which contained two provisions, sections 9(b) and 27, virtually identical to the savings provisions now contained in the FPA. H.R. Rep. No. 715, 65th Cong., 2d Sess. 6, 13 (1918).

The congressional floor debates relating to S. 1419 demonstrate that Congress intended to make state water laws applicable to hydropower projects. Congressman William La Follette, a leading member of the joint committee formed to conduct hearings on the bill, argued that the bill continued the congressional policy of deference to state water laws. 56 Cong. Rec. 9108-9113 (1918). La Follette, citing the Supreme Court's decisions in *Martin v. Waddell's Lessee, supra, Pollard v. Hagan*, 44 U.S. (3 Howard) 212 (1845), and *Kansas v. Colorado*, 206 U.S. 46 (1907), stated that these decisions sustain "the States' sovereignty and right of control of the water, beds and banks of navigable and nonnavigable" waters, and indicate that the federal government does not have "any proprietary rights" to the water. 56 Cong. Rec. 9109 (1918). La Follette declared that the bill was intended to overcome the "divided authority" that prevented hydropower development, stating that:

> [M]any power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. *While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States,* the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals' rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation.

Id. (emphasis added). Thus, La Follette argued that "divided authority" was impeding hydropower development because the federal government was not making lands available for hydropower projects, even where state law granted water rights to such projects. The solution,

he argued, was to reverse federal policy by making lands available for hydropower projects that acquired water rights under state law.[3]

Other congressmen argued in the same vein. Congressman Frank Mondell stated that:

> The waters belong to the people of the States and the only property that the Federal Government has is land. . . . *The bill . . . expressly disavows any intent or purpose of taking over control of the waters from the States.*

56 Cong. Rec. 9113, 9114 (1918) (remarks of Rep. Mondell) (emphasis added). Congressman Frank Doremus stated that "water-power companies organized under this act will be obliged to operate under the laws of the various States." *Id.* at 9768. Congressman John Raker reaffirmed that the federal licensee "gets its rights by applying to the State for it. . . ." *Id.* at 9902. Senator Henry Myers stated that:

> I believe that it is the intention of the bill, as it was of bills that emanated in times past from the Public Lands Committee of the Senate, merely to control, regulate, and dispose of the use of public lands through which the water flows. *It is not intended to interfere with the ownership and control by the State of those waters.*
>
> . . .

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[3] Curiously, the Supreme Court, in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), cited La Follette's "divided authority" statement for its dictum that Congress meant to preempt state water laws. The full statement cited above makes clear that La Follette argued in favor of removing federal obstacles, not in favor of preempting state laws.

> *The State controls the use of the water, the Federal Government controls the use of the public land through which the water flows. The consent of each must be obtained.*

Id. at 10494 (emphasis added).

Both the House and Senate passed different versions of S. 1419, and the differences were resolved in a conference bill. The House approved the conference bill, but the Senate failed to approve the bill before the end of the session. In the following session, in 1920, Congress enacted, and President Wilson signed, H.R. 3184, which was identical to S. 1419. H.R. Rep. No. 61, 66th Cong., 1st Sess. 1 (1919).

The legislative history of the FPA demonstrates unequivocally that Congress only intended to remove federal obstacles to hydropower development, not to preempt state water laws. Congress, assuming that the federal government owned the public lands and that the states owned the water, intended to enact a dual system of control that provided a means for hydropower developers to gain access to federal lands without diminishing the states' authority to regulate water. Congress' intent to continue its historic policy of deferring to state water laws could not be more clearly stated.

III. RELEVANT JUDICIAL DECISIONS DO NOT SUPPORT THE NINTH CIRCUIT COURT OF APPEALS DECISION.

A. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n* Does Not Support The Ninth Circuit Court of Appeals Ruling.

The Ninth Circuit decision interprets *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328

U.S. 152 (1946), as a direct holding by this Court that section 27 protects only proprietary rights. The precise scope of section 27, however, was not at issue in *First Iowa*. The question presented in *First Iowa* was whether section 9(b) of the FPA, requiring "substantial evidence" of compliance with state laws prior to issuance of a hydropower license, required the applicant to obtain the permits required under state law for construction and operation of a hydropower facility.[4] The *First Iowa* decision did not concern, as does the present case, the issue of appropriation, control, use or distribution of water that section 27 recognizes as being subject to state law.

The Court itself recognized the distinction between its holding based on section 9(b) and its dictum regarding section 27: "[t]he directness and clarity of section 27 as a 'savings' clause and its location near the end of the Act emphasized the distinction between its purpose and that of section 9(b). . . ." (Footnote omitted.) *First Iowa*, 328 U.S at 175. The Court went on to state that section 9(b), by calling for evidence of compliance with state laws, did not establish a substantive policy such as that contained in section 27. *Id.* at 177.

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[4] Section 9(b) requires the applicant to submit:

> [s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to beds and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act. 16 U.S.C. § 802(b).

In sum, the Court's holding in *First Iowa* that section 9(b) did not require compliance with state laws is not applicable to the broader and more fundamental question of the substantive policy created by Congress in section 27. As demonstrated in the previous section, proper preemption analysis requires that the Congressional intent to preserve state water law be given effect. Thus, the reliance by the Ninth Circuit in the present case on the *First Iowa* dicta concerning section 27 is misplaced.[5]

B. The Ninth Circuit Decision Conflicts With *California v. United States*.

While the savings clause in the FPA has not been directly interpreted by this Court, section 8 of the Reclamation Act of 1902, the clause that section 27 was patterned after, was interpreted by this Court in *California v. United States*.[6] The Supreme Court's interpretation of section 8 of the Reclamation Act is markedly different than the Ninth Circuit's interpretation of section 27 of the FPA.

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[5] Dicta is not controlling when an issue is squarely presented to this Court for decision. *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 319 n.9 (1977). Thus, any interpretation by this Court of section 27 does not implicate the principles of stare decisis.

[6] Congressional history attests that the savings clause in section 27 of the FPA was directly patterned after section 8 of the Reclamation Act. Congressman Taylor expressly so stated: "I took this language of section 14 [predecessor to section 27] from section 8 of the reclamation bill and inserted it in this bill." 51 Cong. Rec. 14067 (1914). Throughout all of the hearings and debates this fact was repeatedly emphasized by those sponsoring the bill. See 51 Cong. Rec. 13630-31, 14067-68, 14070-72, 14139 (1914); 53 Cong. Rec. 740 (1916), 56 Cong. Rec. 9902, 9113-10494 (1918).

In *California*, the State of California Water Resources Control Board imposed twenty-five conditions on the Bureau of Reclamation's New Melones Project. The Ninth Circuit held that the substantive provisions of state water law were preempted by the Reclamation Act. This Court reversed the Ninth Circuit's holding, instead giving full recognition to the state's right to control the appropriation and use of water involved in a federal reclamation project. The Court held that Congress intended, in the Reclamation Act, "to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675. The Court further stated that to follow the government's interpretation of the Act "would trivialize the broad language and purpose of [section] 8." *Id.* In reversing the Ninth Circuit, this Court assumed that states retained exclusive control over their unappropriated waters.

The Court in *California* expressly rejected dicta in two earlier cases, *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291-292 (1958) and *City of Fresno v. California*, 372 U.S. 627, 630-631 (1963), that limited the scope of section 8 to protection of the proprietary aspects of state water laws, and denied extension to regulatory aspects of state water laws. Specifically overturning its prior decisions in regard to this interpretation, the Court concluded that section 8 required compliance with the substantive as well as proprietary aspects of state law.

Since *California* disavowed the dicta in *Ivanhoe* and *City of Fresno* restricting the scope of section 8 to proprietary aspects of state water laws, the dictum in *First Iowa* similarly restricting the scope of section 27 of the FPA cannot stand. Although the Ninth Circuit attempts to reconcile its decision with *California* by distinguishing the two Acts, this is a distinction without a difference. The

nearly identical clauses of the Reclamation Act and the FPA do not support incongruent interpretations. In general, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense. *Marks v. United States*, 161 U.S. 297, 302 (1896); 2A Sutherland, *Statutory Construction*, §§ 51.02-03 (4th Ed.). In fact, the Court in *First Iowa* specifically noted that section 27 "carries the established meaning of the language [of section 8] into the Federal Power Act. . . ." 328 U.S. at 177 n.20. Thus, if the Ninth Circuit's decision is allowed to stand, a divergence in federal law will occur where state law will apply to federal reclamation projects but not to private hydropower projects.

IV. THE NINTH CIRCUIT DECISION COMPLETELY UNDERMINES COMPREHENSIVE STATE ADMINISTRATION OF WATER RIGHTS

Each state has developed a single comprehensive regulatory scheme for allocating its waters. This is not a mere coincidence but rather a practical necessity, because water is an essential, nonsubstitutable commodity. Its availability, in large part, dictates a state's economic and environmental future. If private rights to use of the water were unregulated, each person would be driven to maximize his present use before others acting in a similar manner deplete the resource. This would lead to a tragedy of the commons[7] and would subject water policy to

[7] Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968). Hardin wrote that a tragedy of the commons occurs when uncontrolled personal rights exist in a shared natural resource. When this occurs, it is not in the best interest of anyone to conserve the resource because conservation merely makes more of the resource available for other users.

the whims of private interest. A single comprehensive water regulatory scheme is the best means of avoiding this tragic outcome.

Each state's comprehensive water law system has evolved in response to the physiographic, hydrologic and climatic conditions of the individual state. In the arid West, states follow some form of the prior appropriation doctrine. In the East, most states follow some form of the common law riparian doctrine. Although the two systems of administration are radically different, each is designed to achieve the same purposes. First, they establish a system for fairly allocating the available water supplies. Second, the systems ensure a predictable water supply for individual water users. The Ninth Circuit decision completely undermines both of these purposes and will eviscerate comprehensive state water regulatory schemes.

In place of the comprehensive balancing of interests possible in state water systems, the Ninth Circuit imposes a regulatory-proprietary dichotomy, suggesting that section 27 merely provides for compensation to vested interests. This dichotomy is untenable, since it ignores the fact that under most state laws the validity of each vested use is decided using a number of factors that are regulatory in nature. For example, in most prior appropriation states there are statutory provisions specifically requiring the state to consider public interest criteria in the permitting process. *See, e.g.*, Alaska Stat. § 46.15.080 (1987); Idaho Code § 42-203(A)(5)(e) (Supp. 1989); Wash. Rev. Code § 90.54.020(3)(A) and (9) (1988).

By basing water allocation decisions on regulatory factors such as public interest criteria, state water systems directly influence community development and environmental protection. Although such determinations may

ultimately have some import at the national level, they are infinitely more important to the citizens of the state where they occur. They shape the priorities for water use between farmers, cities, industries, environmental demands and public interest concerns. Such determinations involve a delicate and complex balancing of benefits and costs associated with each competing use of water.

Under the Ninth Circuit's decision, private hydropower developers would not be required to comply with these regulatory provisions of state law. The decision for all practical purposes effectively precludes any further state balancing of new water demands because the state will have no way of knowing when it makes a decision regarding a particular application to use water what private hydropower projects FERC is likely to authorize in the future on a given stream. FERC can effectively undo a state's careful balancing of competing water uses by the issuance of a single hydropower license. The only remedy under the decision is to seek monetary compensation. Compensation, however, cannot restore the balance struck by the state.

The Ninth Circuit's decision also undermines individual state-created water rights. Although many think that hydropower facilities merely rely on the natural flow of the river, quite the opposite is true. Hydropower projects typically are the largest water user on a stream. Their operation affects water use and allocation in three distinct ways. First, hydropower facilities often store water for release at times of peak power demand. Second, some hydropower facilities divert most, if not all, of the water from a stream into the pen-stocks, thus dewatering a stretch of a stream. Third, the operation of a hydropower facility causes rapid fluctuations in the flow of the

river. Each of these effects has a dramatic impact upon existing and future water uses.

Under the Ninth Circuit decision, individuals have no way of knowing whether the operation of a facility will dewater their headgates or otherwise interfere with their water rights. The state cannot account for these impacts if it has no regulatory authority over the water rights for private hydropower projects. Likewise, FERC cannot account for these effects because it is not a party to the state water licensing process.

Further, limiting section 27 to protection of proprietary rights is certain to lead to a parade of litigation. As noted above, the operation of a hydropower project in large part dictates the amount of water available to other water users at any particular time, creating a likelihood of both permanent and temporary takings. Quantification of damages will be time consuming, difficult and expensive.

As the Supreme Court noted in *California v. United States*, "legal confusion . . . would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 669. The Ninth Circuit decision, if allowed to stand, will create this very situation. There will be two bodies of water law operating side by side, neither one of which will provide any comprehensive planning for the use of finite water supplies or any assurance to a water user that he has an enforceable right to divert water. As a matter of public policy, this result should not be sanctioned; thus, the Supreme Court should grant the writ of certiorari to decide the important federal question raised by the Ninth Circuit decision.

CONCLUSION

The Ninth Circuit's decision that the FPA exempts hydropower projects from state water laws applicable to other water users ignores the express language and legislative history of section 27 of the FPA. Further, the decision disregards established principles of federalism. The practical effect of the Ninth Circuit's decision, if allowed to stand, will be a reversal of 200 years of federal deference to state regulation of water resources. Such a profound change in policy should be reviewed by this Court. Thus, the petition for writ of certiorari should be granted.

Respectfully submitted this 6th day of November, 1989.

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No. 89-333

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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1. DOCKET ENTRIES (NINTH CIRCUIT)

California v. Federal Energy Regulatory Commission, No. 87-7538

* * *

12/21/87 FILED PETITION FOR REVIEW; DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL; NOTIFIED RESPONDENTS OF FILING; SENT PETITIONER CIVIL APPEALS DOCKETING STATEMENT. (ogm) [Entry date 12/22/87]

1/5/88 Filed as of 1/4/88 petitioner's Civil Appeals Docketing Statement served on 12/30/87 (to CONFATT) [87-7538] (ch)

1/11/88 Filed as of 1/8/88, Rock Creek Limited's motion to intervene on behalf of the respondent [87-7538] served on 1/7/88. [411586] (CIVATT) (ogm) [Entry date 1/15/88]

1/15/88 Filed as of 1/13/88, petitioner's (State of California) non-opposition to Rock Creek Ltd's motion to intervene, served on 1/12/88. (CIVATT) [87-7538] (ogm)

* * *

1/27/88 Filed order CIVATT (SMJ) granting motion of Rock Creek Lmtd. to intervene. [411586-1] [87-7538] (dl)

2/3/88 FILED AS OF 2/1/88, CERTIFIED LIST IN LIEU OF ADMINISTRATIVE RECORD ON APPEAL ORIGINAL ONLY. [87-7538] [87-7538] (ch)

2/22/88 Sent letter notifying counsel of exclusion from Pre-Briefing Conference program. setting schedule as follows: appellant's brief, excerpt due on 4/4/88 for State of California. [87-7538] (ch)

3/23/88 Filed as of 3/21/88, Petitioner State of California's motion to file oversized brief with supporting memorandum of points & authorities, [87-7538] served on 3/21/88 [631484]. (CIVATT) (ogm)

3/23/88 Filed as of 3/21/88, Petitioner State of California's motion requesting judicial notice of U.S. government's publications [87-7538] served on 3/21/88 [631516]. (CIVATT) (ogm)

* * *

4/4/88 Received Orig & 15 Petitioner's Opening Brief, 55 pages and 5 excerpts of record, served on 3/21/88. (Motion pending to file oversized brief). [87-7538] (ch)

4/4/88 Filed order (Deputy Clerk: CB) petitioner's motion to take judicial notice of and the accompanying documents are referred to the panel that will decide the case. Any further filings related to the motion shall also be referred to the panel. [631516-1] Granting petitioner's motion to file oversized brief. On or before 04 Apr. '88, petitioner shall file a brief of not more than 55 pgs. [631484-1] [87-7538] (dl) [Entry date 4/5/88]

4/5/88 Filed as of 4/4/88, Orig & 15 Petitioner's Opening Brief, 55 pages, served on 4/4/88. (Previously received) [87-7538] (ch)

4/5/88 Filed motion of Respondent-Intervenor Rock Creek Limited setting schedule as follows: and deputy clerk order: (Deputy Clerk: CB) granting motion & order setting updated briefing schedule. Petitioner's opening brief and briefs of any amici supporting petitioner are due on or before 04 Apr. '88. Respondent's answering brief is due 30 days from service of petitioner's brief. Intervenor's brief and briefs of any amici supporting respondent are due 14 days from service of respondent's brief. Petitioner's optional reply brief is due 14 days from service of intervenor's brief. Any amici brief submitted to the court must be accompanied by the written consent of all parties to the filing of the brief. [665750-1] [87-7538] (dl) [Entry date 4/6/88]

4/14/88 Filed as of 4/13/88, Orig & 15 Western States (State of Idaho, Alaska, Arizon, [sic] Hawaii, et al.,) Amicus Briefs, 41 pages, served on 4/11/88. (Note: oral ext to 4/11/88 granted by clk's office). [87-7538] (ogm)

4/18/88 Filed as of 4/11/88, Orig & 15 Amicus Brief American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River and Environmental Policy Institute, 35 pages, served on 4/8/88. (Accompanied by Consent Letters of Parties to Filing the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/24/88]

4/19/88 Filed motion's of Amicus for leave to present oral argument and ammend [sic] briefing schedule and deputy clerk order (Deputy Clerk: CB) The motion by amici American Rivers, et al., to participate in oral argument is referred to the panel that will decide the case. The motion by amici American Rivers, et al., for amendments of the briefing schedule is granted. Respondent's Brief is due 30 days from service of the brief of amici American Rivers, et al. Subsequent briefing shall be governed by the 4/5/88 order. [87-7538] (ch)

* * *

6/6/88 Filed as of 6/3/88, Orig & 15 Respondent FERC's Brief, 46 pages, served on 6/1/88. [87-7538] (ch)

6/16/88 Filed Orig & 15 Amici Curiae (Modesto & Turlock Irrigation Districts) Brief, 31 pages, served on 6/15/88. (Accompanied by Letters of consent of the parties to filing the Amicus Brief) (Letters in the body of the brief) [87-7538] (ch) [Entry date 6/17/88] [Edit date 6/23/88]

6/22/88 Filed as of 6/20/88, Orig & 15 Amicus Amicus [sic] Utah Power & Light, Southern CA Edison, Pacific Power, and PG&E', Brief, 25 pages; served on 6/20/88. (Accompanied by consent Letters of Parties to filing the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/23/88]

6/22/88 Filed as of 6/21/88, Orig & 15 Amicus City of Klamath' brief 26 pages; served on 6/17/88. (Accompanied by letters of consent by the parties to filing of the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/23/88]

6/22/88 Filed as of 6/21/88, Orig & 15 Amicus National Hydropower' Brief 19 pages; served on 6/20/88. (Accompanied by letters of consent by parties to filing the Amicus Brief). The letters are contanied [sic] in the brief. [87-7538] (ch) [Edit date 6/23/88]

6/23/88 Filed as of 6/22/88, Orig & 15 Amicus Pacific NW Utilities', Brief 27 pages; served on 6/20/88. (Accompanied by letters of consent from parties to filing the Amicus Brief).* [87-7538] (ch) [Edit date 6/23/88]

6/23/88 Filed as of 6/22/88, Orig & 15 Amicus Edison Electric' Brief, 36 pages; served on 6/20/88. (Accompanied by consent letters of parties to file the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/24/88]

6/23/88 Received as of 6/22/88, Orig & 15 Respondent FERC's Substitute Brief, 45 pages; served on 6/1/88. Accompanied by a motion for leave to file Substitute Brief. [87-7538] (ch)

6/23/88 Filed as of 6/22/88, Respondent FERC's motion to file Substitute Brief by FERC. [87-7538]; served on 6/21/88 (PROMO) [945638] (ch) [Edit date 6/23/88]

* * *

6/23/88 Filed as of 6/22/88, Orig & 15 Respondent-Intervenor Rock Creek Limited's Brief, 46 pages, 5 supplemental Excerpts of record, served on 6/20/88. [87-7538] (ch) [Edit date 6/23/88]

6/24/88 Filed as of 6/2/88, Rock Creek Limited Partnership's Motion Requesting Judicial Notice; served on 06/20/88. (CIVATT) [87-7538] [948078] (ch)

6/24/88 Filed as of 6/23/88, Orig & 15 Amicus American Public Power Association's Brief 26 pages, served on 6/20/88 (Accompanied by consent letters of parties to file the Amicus Brief; case file)* [87-7538] (ch) [Edit date 6/24/88]

* * *

7/6/88 Filed order (Deputy Clerk: MLM) granting respondents' motion to file substitute corrected briefs received 22 June '88, for briefs originally served 01 June '88. Petitioner's reply brief is due 14 days from the date of this order. [945638-1] The motion of respondent-intervenor Rock Creek Ltd. Partnership requesting judicial notice of attached documents, and any response to that motion, is referred to the panel that considers the merits of the case. [948078-1] [87-7538] (dl) [Entry date 7/7/88]

7/6/88 Filed original and 15 copies Respondent's substitute/corrected brief 45 pages; served on 6/1/88 [87-7538] (dl) [Entry date 7/7/88]

* * *

7/25/88 Filed as of 7/21/88, Orig & 15 Petitioner's Reply Brief, 22 pages, served on 7/21/88. [87-7538] (ch)

8/26/88 Filed as of 8/24/88, Petitioner's motion for an expedited hearing with supporting memorandum of points & authorities [87-7538] served on 8/23/88 [1160078]. (PROMO) (ogm)

9/1/88 Filed order (Deputy Clerk: AHH) Petr's motion for an expedited hearing is denied. Petr is advised that the court calendars are largely current & that this appeal is scheduled to be calendared for hearing as soon as practicable. [1160078-1] [87-7538] (el)

* * *

11/4/88 CALENDARED: SF 12/16/88 9:00 a.m. Courtroom 15 [87-7538] Case has been moved to Ctrm. 3 (dd) (dd) [Edit date 11/8/88]

11/23/88 Filed Orig & 3, Resp's motion to reschedule oral argument to 12/20/88 [87-7538] served on 11/23/88. (PANEL) [1471222] (ch) [Edit date 11/28/88]

11/28/88 Filed order (Deputy Clerk: AW) denying resp's motion to defer oral argument. Oral argument on the merits shall be heard as scheduled, on Fri, 12/16/88 at 9:00 a.m., in SF. [1471222-1] [87-7538] (el)

11/30/88 Received Amicus American Rivers letter dated 11/25/88 re: status of pending motion for oral argument. (PANEL) [87-7538] (ch)

12/6/88 Filed order (HUG, TANG, BOOCHEVER, CJJ) the motion of the Amici to participate in oral argument is granted only on the condition that the State of Calif is willing to relinquish part of the 1/2 hr. allocated to appellants. It will be the responsibility of the Amici to make any such arrangement. [87-7538] (ogm)

12/14/88 Received Respondent-Intervenor Rock Creek Limited letter dated 12/13/88 re: oral argument 12/16/88 in courtroom 3. (PANEL). [87-7538] (ch)

12/16/88 ARGUED AND SUBMITTED TO: HUG, TANG, BOOCHEVER [87-7538] (gb)

* * *

1/5/89 Filed order (HUG, TANG, BOOCHEVER, author) . . . The parties are requested to file simultaneous briefs not to exceed 14 pgs in length, on or before 21 days from the date of this order. Submission of this case is vacated. Upon the filing of the briefs the case is resubmitted. (See case file for complete text) [87-7538] (el)

1/25/89 Filed Amicus (City of Klamath's) motion to file supple memorandum, [87-7538] served on 1/24/89 [1556921]. (PANEL) (ogm) [Entry date 1/26/89]

1/25/89 Received Original and 15 copies Amicus (City of Klamath) supplemental brief of 8 pages, served on 1/24/89. (Note: motion & supplemental brief incorporated in one document). (PANEL) [87-7538] (ogm) [Entry date 1/26/89]

1/26/89 Filed Original and 15 Petitioner's (State of California) supplemental brief of 14 pages, served on 1/26/89. (PANEL) [87-7538] (ogm)

1/26/89 Filed Original and 15 Respondent's (FERC) supplemental brief of 14 pages, served on 1/25/89. (PANEL) [87-7538] (ogm)

1/27/89 Filed Original and 15 Respondent-Intervenor's (Rock Creek Limited) supplemental brief of 11 pages, served on 1/26/89. (PANEL) [87-7538] (ogm)

1/27/89 Case resubmitted on this date to HUG, TANG, BOOCHEVER. (See previous deferral of submission.) [87-7538] (ogm)

2/2/89 Filed Original and 12 Corrected Respondent's (FERC) Supple Briefs, 14 pages, served on 2/1/89. (PANEL) [87-7538] (ogm)

2/2/89 Received Original and 15 Supplemental Briefs of Amicus Curiae (American Rivers, et al.,) 3 pages, served on 1/26/89. (PANEL) [87-7538] (ogm)

2/15/89 Filed order (HUG, author, TANG, BOOCHEVER) The motion for leave to file Supplemental Memorandum filed by Klamath Falls on 1/25/89 is hereby granted. [87-7538] (el)

2/15/89 Filed original and 15 copies City of Klamath Falls' supplemental memorandum, 8 pages, served on 1/24/89. (previoulsy [sic] rec'd). (PANEL already served) [87-7538] (el)

3/13/89 Received State of California additional citations, served on 3/7/89. (PANEL) [87-7538] (ch)

3/14/89 Received Petitioner State of California's extra copy of their additional citation, received 3/13/89. (Case file) [87-7538] (ch)

3/20/89 Received State of California additional citations, served on 3/16/89. (PANEL) [87-7538] (ch)

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6/6/89 FILED OPINION (HUG, author, TANG, BOOCHEVER, CJJ) AFFIRMED FILED AND ENTERED JUDGMENT. [87-7538] (ch) [Entry date 6/8/89]

6/6/89 JS-34 disposition reported. Termination on the merits after oral argument (Affirmed, Enforced) [87-7538] (ch) [Entry date 6/8/89]

7/3/89 MANDATE ISSUED. [87-7538] (ch)

9/5/89 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 89-333 filed on 8/26/89. [87-7538] (el)

2. NINTH CIRCUIT DECISION

[The Ninth Circuit decision is reproduced in Pet. App. 1-13.]

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3. DECLARATORY ORDER (FERC)

[The Order In Response to Request for Declaratory Order and Providing for Hearing of the Federal Energy Regulatory Commission is reproduced at Pet. App. 14-22. The original order appears in the FERC certified list, at pages 514-522 (Ninth Circuit docket entry 2/3/88).]

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4. ORDER DENYING REHEARING (FERC)

[The Order Denying Rehearing of the Federal Energy Regulatory Commission is reproduced in Pet. App. 23-36. The original order appears in the FERC certified list, at pages 714-726 (Ninth Circuit docket entry 2/3/88).]

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5. ORDER ISSUING LICENSE (FERC)

[Included in FERC certified list, at pages 1-14 (Ninth Circuit docket entry 2/3/88).]

23 FERC ¶62, 137

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Joseph M. Keating — Project No. 3189-003

ORDER ISSUING LICENSE (MAJOR)

(Issued April 29, 1983)

Joseph M. Keating (Applicant) filed an application on June 1, 1982, for a license under Part I of the Federal Power Act (Act) to construct, operate, and maintain the Rock Creek Project No. 3189.[1] The project would be located on Rock Creek, a tributary to the South Fork American River, near Placerville, in El Dorado County, California, and would affect U.S. lands under the administration of the U.S. Bureau of Land Management.

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[1] Authority to act on this matter is delegated to the Director, Office of Electric Power Regulation, under §375.308 (1982), of the Commission's regulations, 18 C.F.R. §375.308 (1982), *FERC Statutes and Regulations* ¶30,238. This order may be appealed to the Commission by any party within 30 days of its issuance pursuant to Rule 1902, 18 C.F.R. 385.1902, *FERC Statutes and Regulations* ¶29,052 47 Fed. Reg. 19014 (1982). Filing an appeal and final Commission action on that appeal are prerequisites for filing an application for rehearing as provided in Section 313(a) of the Act. Filing an appeal does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically directed by the Commission.

Notice of the application has been published, and comments have been received from interested Federal, State, and local agencies. James H. Cosgrove, Ronald L. Johnston and Philip L. Blair (Petitioners) have been granted intervention. Applicant responded to agency comments and Petitioners' intervention by letter dated November 18, 1982. The significant concerns of the intervenor and commenting agencies are discussed below.

PROJECT DESCRIPTION

The proposed run-of-the-river project would consist of: (1) a low concrete diversion structure; (2) an intake structure; (3) a 500-foot-long concrete pipe; (4) a 3,200-foot-long tunnel; (5) three penstocks; (6) a powerhouse with a total installed capacity of 3,000 kW; (7) a transmission line; and (8) appurtenant facilities. A more detailed project description is contained in ordering paragraph (B).

Safety and Adequacy and Economic Feasibility

The proposed concrete gravity overflow diversion dam will be 80 feet long and 6 feet high. It will impound 2.7 acre-feet of water. Failure of the dam would not affect downstream life or property. It is concluded that the dam will be safe for normal operation if constructed in accordance with the plans and specifications using sound construction techniques.

The proposed run-of-the-river project is economically feasible with a cost of approximately 86 mills per kilowatt hour of energy.[2]

Minimum Flows

The California Department of Fish and Game (DFG) recommended that the following minimum flows should be released from the diversion dam: February through June – 20 cfs; July through September – 11 cfs; and October through January – 15 cfs.

The Applicant agreed to release the flows as recommended by DFG for the months of July through January; however, during the remainder of the year the Applicant proposes to release 15 cfs from February through April and 11 cfs for May and June. The flow recommendations of DFG and the Applicant were based on the results of an Instream Flow Methodology (IFG) study conducted by the Applicant.

Staff believes that low standing crop estimates for fishery resources for Rock Creek suggest that factors other than the quantity of available adult habitat, namely, the lack of suitable spawning and rearing habitat and the wide variability in streamflow, are limiting fish production. Based upon available information, it is concluded that the release of the minimum flows on an interim basis as proposed by the Applicant would not adversely impact

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[2] The proposed project, with its average annual energy generation of 7,000 MWh, will utilize a renewable resource that will save approximately 9,900 barrels of oil or 3,200 tons of coal per year.

the fishery resources of Rock Creek. Therefore, Article 37 requires the Licensee to release the following interim minimum flows from the Rock Creek diversion dam: 11 cfs, May through September, and 15 cfs, October through April. Additionally, Article 38 requires the Licensee to conduct studies to determine a long-term minimum flow for the protection of fishery resources.

The Applicant also proposes to conduct pre- and post-project studies to monitor the fishery of Rock Creek and to identify mitigative and enhancement measures which could be implemented to minimize impacts to the fishery. Such a study would allow for a more detailed assessment of the impacts of the project's operation on fishery resources and a determination of measures, including alternative minimum flow releases, necessary to ensure that adverse impacts to the fishery resources associated with operation of the project would be minimized. Therefore, Article 38 requires the Licensee to conduct studies in cooperation with relevant fish and wildlife agencies, and to determine appropriate minimum flows and other measures necessary to minimize adverse impacts to the fishery of Rock Creek.

Fish Screen

The DFG recommended that the Applicant be required to install a fish screen on the intake structure that would be acceptable to the DFG. The Applicant proposes to install, operate, and maintain a fish screen acceptable to the DFG and the Commission. To ensure the protection of fish populations in the river, Article 43, included in the

license, requires the Licensee to file functional design drawings of a fish screen for Commission approval.

Streamflow Measurement

The DFG recommended that the Applicant install a stream gage recorder immediately downstream of the diversion structure to provide for a continuous record of streamflow releases, and that the data obtained from the gage be submitted to the DFG on an annual basis. Applicant has agreed to locate the stream gage at the first available and acceptable location below the diversion structure and has agreed to submit appropriate flow records to the DFG. Standard Article 8 requires the Licensee to install a gage and to maintain flow records in accordance with requirements set forth by the Commission.

Modifications of Project Facilities and Operation

DFG recommended that a fish ladder, if determined necessary, be installed at the diversion structure. Also, DFG requested that provisions be included in the license to allow for modification of project facilities and operations if unforeseen damages occur to fish and wildlife. Standard Articles 12 and 15, included in this license, provide for changes in project facilities and operations should the need arise.

Recreational Resources

No existing public recreational facilities exist within the project area. Some camping associated primarily with

placer mines occurs in the vicinity of the proposed powerhouse. However, the project area has been posted against trespass for many years, and no appreciable recreational uses have occurred in the project area.

The Applicant, in its Report on Recreational Resources, proposes to: (1) provided for picnicking facilities in the vicinity of the powerhouse, including two picnic tables and fire rings; (2) provide an 8-vehicle parking area; (3) allow access for swimming in the area around the Rock Creek Bridge; (4) permit pedestrian access below the proposed diversion structure; and (5) provide fish stocking on Rock Creek and the South Fork American River to encourage a recreational fishery. The agencies had no comment on the Applicant's proposals.

The proposed recreational plan would provide for the public recreational needs of the project area in the immediate future; therefore, the recreational plan will be approved.

Cultural Resources

Two historic sites, an abandoned mine and the abandoned American River Powerhouse, are located within the project area. The California State Historic Preservation Officer (SHPO) indicated by letter of May 12, 1982, that the remains of the American River Powerhouse are not eligible for listing in the National Register of Historic Places, and that project development would have no effect on significant cultural resources. The Applicant concurs with the conclusions of the SHPO.

Although cultural resources are not expected to be impacted by construction and operation of the project, cultural resources are known to exist in the immediate vicinity of the project. Therefore, in accordance with recent Commission practice, Article 39 requires the Licensee to ensure cultural resources protection.

Report on Fish, Wildlife, and Botanical Resources

The Applicant's Report on Fish, Wildlife, and Botanical Resources, as revised on November 18, 1982, includes measures for the protection and enhancement of the project's fish and wildlife resources. The report specifically provides for measures that were recommended by the DFG for inclusion in the license, including: (1) limiting the rate at which water is diverted from the stream (less than 30 percent of streamflow per hour) to prevent fish stranding; (2) installation of fish screens; (3) the removal of sand and sediment from the impoundment area; (4) raptor-proofing of transmission lines; (5) adequate disposal and stabilization of excavated materials; (6) revegetation of denuded project lands with native species valuable to wildlife; and (7) permitting access to the project for fish and wildlife agencies to ensure proper incorporation and operation of fish and wildlife protective measures. The Report on Fish, Wildlife, and Botanical Resources, as revised on November 18, 1982, will be approved and made part of the license.

No Federally-listed threatened or endangered species would be affected by the proposed action.

Environmental Impacts

Construction activities would result in minor, short-term increases in noise, dust, exhaust emissions and sedimentation and erosion from disturbance of streamed and land surfaces.

Construction and operation of the proposed project would involve the loss of up to 2 acres of vegetation for the duration of the project. An approximately 4,750-foot-long segment of Rock Creek would receive reduced flows, but mitigative measures have been proposed that would protect the aquatic environment.

The California Regional Water Quality Control Board stated that water quality would be adequately protected during construction, operation, and maintenance of the proposed project; thus, water quality certification for the project was waived.

On the basis of the record, and Staff's independent analysis, it is concluded that the issuance of a license for the project would not constitute a major Federal action significantly affecting the quality of the human environment.

Other Aspects of Comprehensive Development

Power from the project will be sold to the Pacific Gas and Electric Company to offset oil-fueled power generation. The powerplant will operate at a 26.6 percent plant factor and will utilize approximately 72 percent of the total available flow. The project is not in conflict with any river basin development plan for the South Fork American River.

It is concluded that, subject to the terms and conditions of this license, the Rock Creek Project is best adapted to a comprehensive plan for development of the South Fork American River Basin for beneficial public uses.

Mining Claims

James H. Cosgrove, Ronald L. Johnston, and Philip L. Blair (Petitioners) stated that their mining claims in the area would be adversely impacted if the powerhouse access road is limited to authorized personnel only and if they are denied access. Applicant responded stating that the mining claims were not valid; however, Applicant has agreed that all valid claim owners would be considered authorized personnel and would be granted access. The Bureau of Land Management has also stated that all mining claimants are guaranteed access through the Rock Creek Project right-of-way.

It is ordered that:

(A) This license is issued to Joseph M. Keating under part I of the Federal Power Act (Act) for a period of 50 years, effective the first day of the month in which this order is issued, for the construction, operation, and maintained of the Rock Creek Project No. 3189, located on Rock Creek in El Dorado County, California, and occupying lands of the United States under the administration of the Bureau of Land Management. This license is subject to the terms and conditions of the Act, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Act.

(B) The Rock Creek Project No. 3189 consists of:

(i) All lands, to the extent of the licensee's interests in those lands, constituting the project area and enclosed by the project boundary. The project area and boundary are shown and described by certain exhibits that form part of the application for license and that are designated and described as:

EXHIBIT	FERC NO.	SHOWING
G-1	3189-8	Location Map
G-2	3189-9	Project Features
G-3	3189-10	Project Boundary
G-4	3189-11	Project Boundary
G-5	3189-12	Project Boundary

(ii) Project works consisting of:

(1) a 6-foot-high, 80-foot-long concrete and rock overflow diversion structure at elevation 1,265 feet with 3-foot-high flashboards, and impounding; (2) a 0.36-acre power forebay reservoir with a usable capacity of 5.2 acre-feet; (3) a 500-foot-long, 72-inch-diameter concrete pipe; (4) a 3,220-foot-long, 9-foot-diameter unlined horseshoe tunnel; (5) three 400-foot-long steel penstocks, (two 36-inch-diameter penstocks and one 30-inch-diameter penstock); (6) a concrete block powerhouse at elevation 1,052 feet containing three mobile crossflow generating units, two rated at 1,125 kW each and one rated at 750 kW for a total of 3,000 kW; (7) three 100-foot-long, 4.16-kV generator leads; (8) a 3000/3750 kVA 4.16/12.0 kV transformer; (9) a 75-foot-long, 12-kV transmission line; and (10) appurtenant facilities.

The location, nature, and character of these project works are generally shown and described by the exhibits cited above and more specifically shown and described by

certain other exhibits and reports that also form a part of the application for license and that are designated and described as:

EXHIBIT	FERC NO. 3189 –	SHOWING
F-1	1	Plan View Powerhouse
F-2	2	Powerhouse Foundation Section
F-3	3	Powerhouse Elevation
F-4	4	Overflow Diversion Structure
F-5	5	Cross Sections of Tunnel and Pipeline
F-6	6	Portal Details
F-7	7	Mobile Turbine Conceptual Details

Exhibit A – Section D entitled "Powerhouse and Transmission Line", on pages A-3 and A-4, filed June 1, 1982.

Exhibit E

The *Report on Fish, Wildlife, and Botanical Resources*, filed June 1, 1982, and revised November 18, 1982, (specifically pages 3 through 7 of the revisions, paragraphs d through l and n).

The *Reports on Recreational Resources*, filed June 1, 1982, consisting of: one page of text, numbered E-38 (specifically Section 9.5 entitled "Proposed Measures or Facilities," Items No. 1 through 5).

(iii) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection

with the project, located within or outside the project boundary, as approved or acquiesced in by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibit A (Section D), Exhibit F, Exhibit G, the Report on Fish, Wildlife, and Botanical Resources, and the Report on Recreational Resources of Exhibit E, designated in ordering paragraph (B) above, are approved and made a part of the license.

(D) This license is also subject to the terms and conditions set forth in Form L-2 (revised October, 1975), entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Lands of the United States," designated as Articles 1 through 32, attached to and made a part of this license. The license is also subject to the following additional articles:

Article 33. The Licensee shall file with the Commission's Regional Engineer and the Director, Office of Electric Power Regulation, one copy each of the contract drawings and specifications for pertinent features of the project such as water retention structures, powerhouse and water conveyance structures, at least 60 days prior to start of construction. The Director, Office of Electric Power Regulation, may require changes in the plans and specifications to ensure a safe and adequate project.

Article 34. Licensee shall file for approval as-built Exhibits A, F, and G within one year of completion of construction describing the project as constructed.

Article 35. Licensee shall commence construction of the project within 2 years of the issuance date of this license and complete construction within 4 years of the license issuance date.

Article 36. The Licensee shall review and approve the design of contractor-designed cofferdams and deep excavations prior to the start of construction and shall ensure that construction of cofferdams and deep excavations are consistent with the approved design. At least 30 days prior to start of construction of the cofferdam, the Licensee shall file with the Commission's Regional Engineer and Director, Office of Electric Power Regulation, one copy of the approved cofferdam construction drawings and specifications and a copy of the letter of approval.

Article 37. Licensee shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule or the inflow to the reservoir, whichever is less: May through September – 11 cubic feet per second (cfs) and October through April – 15 cfs. These flows may be temporarily modified if required by operating emergencies beyond the control of the Licensee, for studies required by Article 38, and for short periods for fishery management purposes upon mutual agreement between the Licensee and the California Department of Fish and Game.

Article 38. The Licensee shall, in consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, conduct studies to determine the minimum flow release and other measures needed to ensure protection and enhancement of the fishery

resources in Rock Creek between the dam and the powerhouse. Further, Licensee shall, within 1 year from the date of issuance of this license, file a report of its findings and, for Commission approval, recommendations for a minimum flow release and for other fishery protection and enhancement measures needed in Rock Creek between the dam and powerhouse. Agency letters of comment on the report and recommendations shall be included in this filing.

Article 39. The Licensee shall prior to the commencement of any future construction at the project, consult with the California State Historic Preservation Officer (SHPO) about the need for any cultural resource survey and salvage work. The Licensee shall make available funds in a reasonable amount for any such work as required. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historical resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historical work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 40. The Licensee shall pay the United States the following annual charges:

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 4,000 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of approximately 11.61 acres of its lands, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 41. Pursuant to Section 10(d) of the Act, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the new investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One half of the project surplus earnings, if any, accumulated after the first 20 years of operation under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year after the first 20 years of operation under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve

account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10 year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 42. (a) In accordance with the provisions of this Article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies

for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more *than 10 watercraft at a time and where said facility is intended to serve single family-type dwellings;* (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State

and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a

project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more that [sic] 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause

(d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any Federal or State agency official consulted, and any Federal or State approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraphs (c) or (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with

overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 43. Licensee shall, within 6 months following the issuance of this license, file for Commission approval, functional design drawings of a fish screen for the intake of the Rock Creek Project, prepared in consultation with the U.S. Fish and Wildlife Service and the California

Department of Fish and Game. Agency comments on the proposed fish screen design shall be included in the filing. Within 6 months after completion of construction of the screen, Licensee shall file as-built drawings with the Commission.

(E) The Licensee's failure to file a petition appealing this order to the Commission shall constitute acceptance of this license. In acknowledgment of acceptance of this license, the license shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

/s/ Lawrence R. Anderson
Lawrence R. Anderson
Director, Office of Electric
Power Regulation

[Attestation omitted.]

Form L-2
(Revised October, 1975)

FEDERAL POWER COMMISSION

TERMS AND CONDITIONS OF LICENSE FOR UNCONSTRUCTED MAJOR PROJECT AFFECTING LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alternation

or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alternation, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alternation as the Commission may direct.

Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alternations to the project. Construction of the project works or any feature or alternation thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and

regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is

transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: *Provided*, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric

energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the

Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per

specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably

required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the propose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided,* That the Licensee may reserve from public access such portions of the project

waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alternation of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance

of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided*, That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of reasonability for the clearing and disposal of all slash and debris from project lands.

Article 22. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the land to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 23. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the

United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 24. The Licensee shall be liable for injury to, or destruction of, any building, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 25. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 26. In the construction and maintenance of the project, the location and standard of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 27. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive inference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 28. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such

officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 29. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, *et seq.*), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: *Provided,* That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: *Provided further,* That in the event of disagreement, any question of unreasonable interference shall be determined by the Commission after notice and opportunity for hearing.

Article 30. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency

having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of non-power facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 31. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 32. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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6. Decision 1596 (SWRCB)

[Attached as Exhibit A to Cal. Request for Rehearing, included in FERC certified list, at pages 599-703 (Ninth Circuit docket entry 2/3/88).]

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 26380 and 27353	)	DECISION 1596
JOSEPH M. KEATING,	)	SOURCE: Rock Creek
Applicant;	)	COUNTY: El Dorado
CALIFORNIA DEPARTMENT OF FISH AND GAME,	)	
Protestant.	)	

DECISION APPROVING APPLICATIONS 26380 AND 27353

BY BOARD VICE CHAIRMAN NOTEWARE:

Joseph M. Keating having filed Applications 26380 and 27353 for permits to appropriate unappropriated water from Rock Creek; protests having been received; a hearing having been held on September 14, 1983; the Board having considered all evidence in the record; the Board finds as follows:

1. *Scope of Applications*

Both Application 26380 and Application 27353 are for permits to appropriate water from Rock Creek by direct diversion for the purpose of power generation. Application 26380 is for diversion of 100 cfs from January 1 through December 31 of each year, and Application 27353

is for diversion of 140 cfs from October 1 through May 31 of each year, for a combined diversion of 100 cfs from June 1 through September 30 and 240 cfs from October 1 through May 31. Under both applications the point of diversion is from Rock Creek with in the NE1/4 of NW1/4 of Section 21, T11N, R11E, MDB&M and the point of return is to Rock Creek at its confluence with the South Fork American River within the SW1/4 of SW1/4 of Section 20, T11N, R11E, MDB&M.

2. *Project Description*

a. Water will be diverted from Rock Creek approximately one mile upstream of the confluence of Rock Creek with the South Fork American River. The water will be transported through a 500-foot-long, 72-inch-diameter concrete pipe into a 3,200-foot-long, 8-foot x 9-foot horseshoe shaped tunnel, then into three existing 400-foot-long penstocks, then into a powerhouse, and finally returned to the South Fork American River using portions of an existing tailrace. Diversion is proposed to be by a 6-foot-high, 80-foot-long rock and concrete diversion dam which will create a 5.2 acre-foot forebay reservoir with a surface area of 0.36 acre. Alternatively, diversion will be by a 12- to 13- foot high dam which will create a 13.5 acre-foot reservoir with a surface area of 0.85 acre.

b. The powerhouse will be built on the remaining foundation of a prior powerhouse. The project will use two penstocks formerly used in association with the prior powerhouse.

c. A seventh-five foot long transmission line will connect the powerhouse to an existing Pacific Gas and Electric transmission line.

d. The powerhouse will house three mobile turbine/generator units, one with 750 kilowatts capacity and two with 1,125 kilowatts capacity, for a total capacity of 3,000 kilowatts. Together, the three units are capable of generating an average of almost 7,000 megawatt-hours of electricity annually.

3. *Protests*

a. The California Department of Fish and Game and the Northern California Council of Fly Fishing Clubs (NCCFFC) protested the applications. Both protests are on the grounds that:

(1) The project as proposed will not best preserve the public interest, and

(2) The project as proposed will have an adverse environmental impact.

The Department of Fish and Game alleges that Rock Creek supports a population of resident rainbow trout and serves as a source of fish for the South Fork American River. The Department seeks to have flows retained in Rock Creek to protect the beneficial use of the stream by fish. An authority, it cites Water Code §§1243 and 1257 and Fish and Game Code §§5937 and 16083.

The NCCFFC alleged that Rock Creek provides habitat and riparian vegetation, and sustains wild trout populations and habitat. It sought to have flows retained in Rock Creek to protect the beneficial uses of the stream.

As authority, NCCFFC cited Water Code §§100, 1243, and 1257, and Fish and Game Code §5937.

b. With the agreement of the NCCFFC (made by telephone on August 23, 1983) the hearing was scheduled for September 14, 1983. The Board received NCCFFC's Notice of Intent to Appear on September 7, 1983. However, no representative of NCCFFC appeared, and NCCFFC failed to leave messages or communicate to the Board or its staff that it would not appear.

Pursuant to 23 Cal.Admin.Code §731, the Board on September 15, 1983, notified NCCFFC's representative by telegram that he had five days in which to show good cause for NCCFFC's failure to appear. On September 20, 1983, the representative offered as his showing of good cause statements that (1) he was require to appear in court on September 14, 1983; (2) his witness was not qualified to address the written testimony that had been submitted; (3) he had been unable to reach a Board staff member to give notice NCCFFC would be unrepresented at the hearing. None of these statements constitutes good cause for NCCFFC's failure to appear at the hearing. Consequently, NCCFFC's protest was dismissed by the hearing officer.

4. *Need for the Project*

The project will have a maximum installed capacity of 3 megawatts (MW) and will generate between 6,400,000 and 6,700,000 kilowatt hours (KWh) in an average year. The applicant expects to sell the project's power to Pacific Gas and Electric (PG&E) under the federal Public Utilities Regulatory Policies Act of 1978 (16 U.S.C.

§824a-3). The project will meet approximately 0.2 percent of PG&E's projected need for new capacity and 0.05 percent of PG&E's projected need for new energy supplies in 1994.

The Energy Commission has adopted preferential ranking among technologies for meeting future electricity needs. The ranking places small hydroelectric projects (including this project) in the third of six priority ranks. No evidence was received that sufficient projects will be available to meet all the projected needs of the PG&E service area in 1994 with alternatives listed in the first three priority ranks. Therefore, a need will exist for the capacity and energy to be provided by the project.

5. *Economic Feasibility of the Project*

a. If this project is not economically feasible, the water allocated to the project by water right permits will not be put to beneficial use. Water allocated under a water right must be put to beneficial use. Water Code §§1240, 1375, 1396, 1397, 1410. Issuance of a permit to an infeasible would make the water unavailable for appropriation by others who might be able to establish a feasible project, resulting in a failure to put the appropriated water to beneficial use. In order to ensure that any water allocated to the applicant under a water right permit is put to beneficial use, the Board must inquire into the project's financial feasibility.

b. Construction cost of the project is estimated at $3,200,000. Annual costs are estimated at $375,000 to $494,000. These costs must be compared to the project's revenues in order to determine whether it is or may be

economically feasible. If the project is not economically feasible it is unlikely to receive full financing.

The amount of project revenues will depend upon the price that PG&E will pay for the project's energy and capacity. This in turn depends on (1) the price PG&E must pay for the project's power under the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §824a-3, and (2) the type of contract PG&E offers the applicant for this project's power.

Currently PG&E has a short-term standard offer purchase contract approved by the Public Utilities Commission under which it could contract to buy the project's power. The price terms under this contract are adjusted approximately every quarter. Prices vary with the season and time of day. For power generated in the months of October through April PG&E was paying, at the time of the hearing, 6.059¢/KWh, plus 0.12¢/KWh for as-delivered capacity, for a total payment of 6.179¢/KWh.

The Board received evidence that at the time of the hearing, PG&E had a long-term standard purchase contract before the Public Utilities Commission for review. Under the proposed contract prices would be agreed upon in advance, for up to twenty years. One option would in effect average the projected increase, over time, in avoided cost, and pay producers an averaged price. Thus, the producer would be expected to receive more than the avoided cost in the near term and less than the avoided cost in the long term. The amount that PG&E will pay, however, is speculative. The draft contract which the applicant provided to the Board during the hearing lists a price of 7.09¢/KWh for energy delivered

under a 20-year contract and 6.19¢/KWh for energy delivered under a 15-year contract. The additional amount payable for as-delivered capacity is not shown. The applicant, however, estimates that PG&E may pay a total of 8.5¢/KWh including capacity. Under the proposed contract this would mean a payment of 1/41-2.31¢/KWh for as-delivered capacity. Since the project will produce the bulk of its power during the October through April period when power is plentiful and capacity is less valuable, this estimated payment for capacity may not be attainable.

c. Based on the amount of electricity the project will generate annually, the project's projected annual costs, and the prices being paid by PG&E currently for power under its approved short-term contract, the project's annual net revenues would range from a loss of $99,000 to a profit of $40,000. Under the proposed long-term contract, assuming a total purchase price of 8.5¢/KWh, the project's annual net revenues would be a profit ranging from $544,000 to $569,000. Thus, the project economically will be marginal under the short-term contract and will be feasible under the long-term contract assuming a price of 8.5¢/KWh.

d. Because the project's economic feasibility and, therefore, its likelihood of putting water to beneficial use, is dependent on the price that PG&E will pay for the project should be contructed [sic]. Consequently, it will place terms and conditions on the permits for the project to ensure that it is not constructed unless it will put the appropriate water to beneficial use.

6. *Availability of Unappropriated Water*

a. Because the only gaging station on Rock Creek was not installed until 1982, the applicant's hydrologist estimated the amount of water available in the Rock Creek watershed based on published data from other watersheds though to be typical of the Rock Creek watershed. Evidence was presented that high flows may be longer in duration than those estimated in the applicant's hydrology study. This is speculative.

While the stream does not continuously carry a flow as high as the requested diversion rates, and some flows will have to be bypassed for fishery and riparian vegetation protection, sufficient water appears available to justify the requested diversion rates.

b. Upstream development should be protected in the Rock Creed watershed. Such development may arise in the future, and likely will require water for domestic and stockwatering uses. Such uses should, in the public interest, be given higher priority than power uses. Consequently, the permits should be made subject to upstream appropriations for these uses within the watershed.

7. *Effect on the Fishery*

a. Rock Creek is important because it provides fishery recruitment to the South Fork American River and because it directly provides adult trout for angler harvest. Because Rock Creek provides fishery recruitment for the South Fork American River (a navigable waterway), diversion of water needed for fishery use from Rock Creek may affect fishery uses of the river. Under *National*

Audubon Society v. Superior Court, 33 Cal.3d 419, 189 Cal.Rptr. 346 (1983), fishery uses of the river appear to be protected by the public trust. Consequently, the Board has considered the effect of the applicant's proposed diversion on the uses of the South Fork American River and herein, to the extent feasible and within the standard of reasonableness contained in California Constitution Article X, §2, attempts to avoid or minimize harm to the fishery of the South Fork American River.

b. The Board's objective in mitigating the effects of this project on the fishery of Rock Creek and South Fork American River is to protect the existing resources of Rock Creek at natural, preproject, levels. This objective is in accordance with the policy of the Department of Fish and Game.

c. In order to determine the minimum flows to be bypassed by the project for protection of the fishery and riparian vegetation, the applicant's consultant performed fishery studies on Rock Creek using the U.S. Fish and Wildlife Service's Instream Flow Incremental Methodology three-flow methodology, known as IFG-4, population estimates, and hydrology information. Based on the studies, the Department of Fish and Game, the applicant, and the Federal Energy Regulatory Commission arrived at three different minimum flows for Rock Creek. Evidence was presented that the instream flow study is deficient. The Board finds that it is deficient. Because of the deficiencies, no valid basis exists for the minimum flows proposed by the applicant, the Federal Energy Regulatory Commission, or the Department of Fish and Game. It is deficient in the following ways.

(1) It modeled less than half of the habitat types to be affected by the project. The types which should have been modeled include spawning habitat and the low gradient riffle habitat in the upper part of the affected reach.

(2) The side channel in the stream segment modeled by the applicant's contractor was not modeled, and should have been modeled.

(3) The upper portion of the reach of the creek affected by the project through inundation or reduced flows should be modeled.

d. The fishery population estimates were made using electroshocking techniques. Evidence was presented that some of the electroshocking data is questionable.

e. Since the bases for setting a minimum bypass for instream flows are deficient, the Department of Fish and Game agrees that the flows may, pending further study, be set at the same levels as the Federal Energy Regulatory Commission has required on an interim basis in the license it issued to the applicant. These flows are 15 cfs during October through April and 11 cfs during May through September. The Department requests that the Board reserve jurisdiction to change the flows after the applicant does a new IFG-4 study or supplements the old one. The Board finds that a new study should be done before the applicant commences any construction in Rock Creek, diverts water from Rock Creek, or otherwise disturbs the natural flow and habitat of Rock Creek except to accomplish the study.

f. A fish screen will be needed at the diversion site to prevent fish from being diverted into the power tunnel and through the power generators. The size and placement of the screen will depend on its type. The screen should be approved by the Department of Fish and Game.

g. The applicant proposes to stock trout in Rock Creek. Department of Fish and Game has stated that it has no objection to stocking if the project is mitigated to ensure that no net loss of natural trout occurs.

h. The applicant should do the new or supplemental IFG-4 study and develop minimum instream flow requirements in cooperation and consultation with the Department of Fish and Game.

8. *Geo-Physical Effect of the Proposed Construction*

a. The applicant proposes to excavate a nearly horizontal tunnel, 3,200 feet long. Except in zones of decomposed granite, the applicant plans to leave the tunnel unlined. In areas where decomposed granite is encountered, the applicant will gunite line the tunnel. The water in the tunnel will be lightly pressurized. If it is unlined, excessive water losses may occur in the tunnel. Therefore the applicant should install measuring devices capable of detecting losses in the conveyance system including the tunnel. The maximum loss that should be allowed is eight percent. If losses exceed eight percent, the applicant should take steps to reduce losses to eight percent or less.

b. To ensure that the applicant complies with construction and operating mitigation measures imposed by

other agencies, the permit should contain a term which will require all necessary federal, state, and local approvals before commencement of construction.

9. *Compliance With the California Environmental Quality Act*

The Board as lead agency has prepared and approved a mitigated Negative Declaration for the applicant's project in accordance with the requirements of the California Environmental Quality Act (Public Resources Code §§21000 et seq.). After the Board adopts this decision it will file a Notice of Determination with the Secretary for Resources. Consideration of the Mitigated Negative Declaration and Initial Study, inclusion of the Negative Declaration's mitigation measures in the water right permits, and filing of the Notice of Determination will satisfy the Board's responsibilities under the California Environmental Quality Act.

10. *Right of Access*

The applicant has not yet obtained rights of access to all of the lands needed for the project. A question exists whether the applicant will obtain all the necessary rights. Consequently, the Board's standard term 22, Right of Access, should be included in the water right permits issued for this project.

11. *Time Limits*

Twelve months after the permit is issued is a reasonable time period for the applicant to obtain financing and

commence construction. Construction can be completed within three years after the permit is issued. Complete application of the appropriated water to the authorized use can be accomplished by June 1 of the seventh year after construction is completed. Therefore, the permits issued for this project should contain terms and conditions setting these time periods as limits within which the applicant may obtain financing and commence construction, complete construction, and completely apply the appropriated water to the authorized use.

12. *Conclusion*

Based on the foregoing findings, the Board concludes that Applications 26380 and 27353 should be approved for power purposes and permits issued to Joseph M. Keating subject to the terms and conditions in the following order.

ORDER

IT IS HEREBY ORDERED that Applications 26380 and 27353 be approved for power purposes and that permits be issued to the applicant subject to vested rights. The permit shall contain standard permit terms 6, 10, 11, 12 and 13 (a copy of the Board's standard permit terms is available upon request) in addition to the following terms and conditions.

1. The water appropriated under the permit issued on Application 26380 shall be limited to the quantity which can be beneficially used and shall not exceed 100 cubic feet per second by direct diversion from Rock

Creek, to be diverted from January 1 through December 31 of each year.

The equivalent of the continuous flow allowance for any 14-day period may be diverted in a shorter time, provided there be no interference with other rights.

2. The water appropriated under the permit issued on Application 27353 shall be limited to the quantity which can be beneficially used and shall not exceed 140 cubic feet per second by direct diversion from Rock Creek, to be diverted from October 1 through May 31 of each year.

Th equivalent of the continuous flow allowance for any 14-dav period may be diverted in a shorter time, provided there be no interference with other rights.

3. Water diverted under this permit is for nonconsumptive uses and is to be released to Rock Creek at its confluence with the South Fork American River within the SW1/4 of SW1/4 of Section 20, T11N, R11E, MDB&M.

4. Permittee shall obtain full project financing and commence construction of the project within two years after the date of this permit and shall thereafter prosecute the project with reasonable diligence. In no event shall permittee commence construction in Rock Creek or divert any water from Rock Creek unless it has financing to completely construct the project.

5. Project construction work shall be completed by December 1 of the fourth year after the date of this permit.

6. Permittee shall make complete application of the water to the authorized use by December 1, 1995.

7. All rights and privileges to appropriate water for power purposes under this permit and any subsequently issued license are subject to depletions resulting from future upstream appropriation for domestic and stockwatering uses within the watershed. Such rights and privileges may also be subject to future upstream appropriations for uses within the watershed other than domestic and stockwatering if and to the extent that the Board determines, pursuant to Water Code §§100 and 275, that the continued exercise of the appropriation for power purposes is unreasonable in light of such proposed uses. Any such determination shall be made only after notice to permittee or licensee of an application for any such future upstream appropriation and the opportunity to be heard; provided that a hearing, if requested, may be consolidated with the hearing on such applications.

8. For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

a. From October 1 through April 30, a minimum of 15 cubic feet per second;

b. From May 1 through September 30, a minimum of 11 cubic feet per second.

The total streamflow shall be bypassed whenever it is less than the amount designated for that period.

No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring these bypass flows.

9. a. Permittee, in consultation and cooperation with the Department of Fish and Game, shall conduct an

Instream Flow Incremental Methodology IFG-4 flow study within the reach of Rock Creek from 550 feet upstream of the diversion dam downstream to the point of return of water from the proposed powerhouse at the confluence of Rock Creek with South Fork American River. The study shall evaluate the effects of flow levels on trout life history stages and on habitat needed to support the different life stages.

The study shall model all representative habitats of the affected reach of Rock Creek including the habitats not previously modeled by the applicant's contractor. (These include the spawning habitat, the low gradient riffle habitat in the upper part of the affected reach, and the side channel of the stream segment previously modeled by the permittee's contractor.) To the extent possible, and with the agreement of the Department of Fish and Game, the permittee may use the original IFG-4 study to supplement the new study.

b. All field work elements of the study described in a. shall be completed prior to commencement of any construction work in the channel and overflow areas of Rock Creek within the reach described in a. No diversion of water shall be made from Rock Creek until the study described in a. is completed and the results evaluated.

c. The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 8 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after evaluating

the results of the study described in a. and after notice to interested parties and opportunity for hearing.

10. In accordance with Section 1601, Section 1603 and/or Section 6100 of the Fish and Game Code, no work shall be started on the diversion works and no water shall be diverted until permittee has entered into a stream or lake alteration agreement with the Department of Fish and Game and/or the Department has determined that measures to protect fishlife have been incorporated into the plans for construction of such diversion works. Construction, operation, and maintenance costs of any required facility are the responsibility of permittee.

11. No construction shall be commenced and no water shall be used under this permit until all necessary federal, state and local approvals have been obtained, including compliance with any applicable Federal Energy Regulatory Commission requirements.

12. a. Measuring devices shall be installed by permittee that are capable of measuring water losses and gains in the closed conduit system from the point of diversion to the point of return.

b. Loss data shall be tabulated for the period October 1 of one year through September 30 of the succeeding year in daily increments and shall be submitted to the State Water Resources Control Board by October 15 of each year.

c. If the loss exceeds eight percent of the amount of flow being diverted from Rock Creek, permittee shall take whatever steps are necessary to reduce the loss to eight percent or less. Failure of the permittee to

achieve that level of loss within two years after loss in excess of eight percent was first detected shall constitute a violation of this permit term.

13. This permit shall not be construed as conferring upon the permittee right of access to the proposed point of diversion, conveyance facilities or the powerhouse and appurtenant structures.

14. No major construction activities shall occur in the flowing water.

15. Construction activities adjacent to streams and any necessary erosion control measures shall be completed prior to heavy runoff periods.

16. Material from road and other construction work shall not be deposited where it could be eroded and carried to the stream by surface runoff or high stream flows.

17. Where working areas encroach live streams, barriers shall be constructed which are adequate to prevent the flow of turbid water into the stream.

18. During construction, cofferdams shall segregate the zone of construction activity from streamflow. Provisions shall be made to allow streamflow to bypass the construction zone with a temporary diversion conduit.

19. Permittee shall provide automatic emergency shut off gates or valves at the beginning of the penstock capable of discontinuing the flow of water in the event of penstock failure or to dewater the penstock for maintenance purposes.

20. All construction activities required to build the dam, tailrace, and tunnel intake portal shall be scheduled during low flow periods.

21. Provisions shall be made to prevent spillage or disposal of oils, fuels, or associated containers in the construction zone. Disposal shall only be at approved locations.

22. To minimize the opportunity for contamination of the environment from machinery lubricants, and coolants, all electrical generation equipment shall be contained inside a structure.

23. All access roads shall be provided with drainage control measures to prevent erosion of road surfaces.

24. Exposed and unstable soils shall be stabilized by physical means until the soil can be successfully revegetated.

25. A fire protection plan shall be developed between the applicant and the Bureau of Land Management prior to project construction. Among the items to be considered are transmission line safety and protection, a fire hydrant valve on the penstock, and other fire prevention criteria that may be incorporated into the design, construction, and operation of the project.

26. An activities and restoration plan shall be developed, in consultation with the U. S. Bureau of Land Management, to ensure that construction work is accomplished with minimum damage and that appropriate rehabilitation is performed.

27. An acceptable land fill location shall be determined in cooperation with the U. S. Bureau of Land

Management and El Dorado County for disposal of dredged or excavated spoil material.

28. Facilities shall be colored where applicable to blend the facilities into the natural setting. This shall be coordinated with the U. S. Bureau of Land Management.

29. For purposes of recreational mitigation, permittee shall:

(a) provide for picnicking around the powerhouse area with two picnic tables with designated fire rings. Season of use shall be designated on a posted warning to prevent use during critically dry periods.

(b) provide parking for eight vehicles on the access road before any gate structure.

(c) not restrict foot traffic below the proposed diversion structure.

This term shall not be construed to prevent implementation of security measures to protect the project facilities.

30. A qualified archeologist shall be present during excavations at the tunnel exit, trifurcation section, new penstock location (if a new penstock is proposed) and outside the limits of the existing powerhouse location and tailrace. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Permittee shall consult with the State Historic Preservation Office (SHPO) to develop a mitigation plan for the

protection of significant archeological or historical resources.

31. Permittee shall install a fish screen of a type and in the location that is acceptable to the Department of Fish and Game.

Dated: Feb 16 1984

/s/ Carole A. Onorato
CAROLE A. ONORATO, Chairman

/s/ Warren D. Noteware
WARREN D. NOTEWARE,
Vice Chairman

/s/ Kenneth W. Willis
KENNETH W. WILLIS, Member

/s/ F. K. Aljibury
F. K. ALJIBURY, Member

7. STAFF ANALYSIS (SWRCB)

[Attached as Exhibit C to Cal. Request for Rehearing, included in FERC certified list, at pages 599-703 (Ninth Circuit docket entry 2/3/88).]

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ROCK CREEK HYDROELECTRIC PROJECT
STAFF ANALYSIS OF RECORD

PERMITTED APPLICATIONS 26380 AND 27353 OF ROCK CREEK LIMITED PARTNERSHIP; ROCK CREEK TRIBUTARY TO SOUTH FORK AMERICAN RIVER

EL DORADO COUNTY

JANUARY 1987

* * *

3.0 PROJECT HISTORY [p. 2]

Applications 26380 and 27353 were filed March 22, 1980 and June 4, 1982, respectively, by Joseph M. Keating. Protests were received and, subsequent to a Board hearing, permits were issued on the applications June 12, 1984. Due to a change in ownership of the project, the permits were assigned to Rock Creek Limited Partnership December 20, 1985. Following is information from the project files on permitted applications 26380 and 27353.

* * *

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8. WATER RIGHTS ORDER 87-2 (SWRCB)

[Attached as Exhibit A to Cal. Motion to Intervene, included in FERC certified list, at pages 530-598 (Ninth Circuit docket entry 2/3/88).]

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 19259 and 19260, Issued on Applications 26380 and 27353, ROCK CREEK LIMITED PARTNERSHIP, Permittee,	ORDER: WR 87-2 SOURCE: Rock Creek COUNTY: El Dorado

ORDER AMENDING WATER RIGHT
PERMITS 19259 AND 19260

BY THE BOARD:

1.0 INTRODUCTION

Permits 19259 and 19260 having been granted on Applications 26380 and 27353 subject to terms and conditions; the Department of Fish and Game (hereinafter referred to as "Department") having requested that the State Water Resources Control Board (hereinafter referred to as "Board") amend Permits 19259 and 19260 to require a greater bypass of streamflow for the fishery; a public hearing having been held before the Board on May 19, 1986 and on September 15, 1986; permittee and the Department having appeared and presented evidence; the Board having considered all evidence in the record, the Board finds as follows:

2.0 BACKGROUND

2.1 On February 16, 1984, the Board in Water Right Decision 1596 ordered that Permits 19259 and 19260 be issued to Joseph Martin Keating subject to certain terms and conditions. Mr. Keating subsequently sold the project to Rock Creek Limited Partnership, which became the water right permittee. Conditions 9 and 10 of Decision 1596, which became terms 16 and 17 of Permits 19259 and 19260, are the subject of the current proceeding.

2.2 Permit term 16 provides:

"For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

"a. From October 1 through April 30, a minimum of 15 cubic feet per second;

"b. From May 1 through September 30, a minimum of 11 cubic feet per second;

"The total streamflow shall be bypassed whenever it is less than the amount designated for that period."

"No water shall be diverted under this permit until permitte has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring these bypass flows."

2.3 Permit term 17 provides:

"a. Permittee, in consultation and cooperation with the Department of Fish and Game, shall conduct an Instream Flow Incremental Methodology IFG-4 flow study within the reach of Rock Creek from 500 feet

upstream of the diversion dam downstream to the point of return of water from the proposed powerhouse at the confluence of Rock Creek with South Fork American River. The study shall evaluate the effects of flow levels on trout life history stages and on habitat needed to support the different life stages.

The study shall model all representative habitats of the affected reach of Rock Creek including the habitats not previously modeled by the permittee's contractor. (These include the spawning habitat, the low gradient riffle habitat in the upper part of the affected reach, and the side channel of the stream segment previously modeled by the permittee's contractor.) To the extent possible, and with the agreement of the Department of Fish and Game, the permittee may use the original IFG-4 study to supplement the new study.

"b. All field work elements of the study described in a. shall be completed prior to commencement of any construction work in the channel and overflow areas of Rock Creek within the reach described in a. No diversion of water shall be made from Rock Creek until the study described in a. is completed and the results evaluated.

"c. The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after evaluating the results of the study described in a. and after notice to interested parties and opportunity for hearing."

2.4 The key issues for hearing were listed as:

"1. Has the permittee performed the fisheries habitat study as required by terms 17a and 17b?

"2. Should the bypass flows required in term 16 be revised and, if so, what flows should be required?

"3. Should term 20 be amended to allow static tests to determine the seepage loss of the tunnel?"

The third issue, regarding term 20, was resolved before the hearing and term 20 of each of the two permits was amended in accordance with the permittee's request. The first and second issues, therefore, were the subject of the hearing.

2.5 Permits 19259 and 19260 authorize direct diversion not to exceed 100 cubic feet per second (cfs) all year and not to exceed 140 cfs from October 1 through May 31, respectively, for the purpose of generating hydroelectric energy.

2.6 The Department, after reviewing and evaluating the fishery studies performed by the permittee, requests that the permittee by required to bypass flows of the lesser of 30 cfs or natural flow from October 1 through February 29 and the lesser of 60 cfs or natural flow from March 1 through September 30. Permittee opposes the Department's recommendation and recommends that the permits continue to require the bypass of 15 cfs from October 1 through April 30 and 11 cfs from May 1 through September

30. To support its position, permittee has raised several procedural and jurisdictional issues which we will consider before discussing the merits of the bypass flow requirements recommended by the two parties.

3.0 JURISDICTIONAL ASSERTIONS

Permittee asserts three jurisdictional claims which may be summarized as follows:

1. With respect to hydroelectric power licensees of the Federal Energy Regulatory Commission ("FERC"), California law governing appropriation of water is preempted by federal law;

2. Permittee's project may be operated in exercise of riparian rights recognized under California law; and

3. Permittee's project may be operated in exercise of a combination of such riparian rights and federal reserved rights.

The relevance of these claims to the present stage of this proceeding is highly questionable. If any one of these claims is wholly correct, then permittee would not be required to obtain a permit from this Board to appropriate unappropriated water. Permittee has, however, made application for such permit and a permit has in fact been issued. The proceeding at this stage is concerned with the issue of what streamflow bypass conditions should be required of permittee to protect the fishery; the Board has expressly reserved jurisdiction to address this issue

and amend the permits in accordance with its findings. We do not perceive what permittee's jurisdictional claims have to do with the issue of the streamflow bypass flows that should be required in the permits; these claims go to the question of *whether* permittee is bound to obtain a conditional appropriative water right permit at all, not to the question of *what conditions* should, in the public interest, be imposed in the permits. In other words, permittee cannot reasonably urge absence of permit jurisdiction as grounds for retaining the existing provisional streamflow bypass permit conditions.

However, notwithstanding that permittee's jurisdictional assertions have no apparent relevance to the issue whether the bypass flows should be revised, we briefly discuss permittee's claims below, to explain why the Board has jurisdiction is this matter and therefore has not dismissed the proceeding herein.

3.1 *Federal Preemption of Control Over Appropriation of Water*

Permittee argues that the Board has no power to issue permits for hydroelectric power plants licensed by the Federal Energy Regulatory Commission (hereinafter referred to as "FERC"). The FERC is a successor of the Federal Power Commission (hereinafter referred to as "FPC"). In support of its contention that the FERC has jurisdiction to license the Rock Creek Project and that federal jurisdiction over the Rock Creek project is exclusive, permittee

cites several cases decided in the United States Supreme Court and in other federal courts.

We agree with permittee that the FERC has jurisdiction to license the Rock Creek Project. However, we disagree with permittee's contention that FERC's jurisdiction is exclusive with regard to the control of the diversion and use of water for hydroelectric power generation.

First, the language of the Federal Power Act is explicit in requiring that an applicant for a license from the FERC comply with state law requirements with respect to the beds and banks of streams and the appropriation, diversion, and use of water for power purposes. 16 U.S.C. § 802(b) (Section 9(b) of the Act). Further, the Federal Power Act provides that nothing contained in the Act affects or is intended to affect or interfere with state laws relating to the control appropriation, use or distribution of water. 16 U.S.C. §821 (Section 27 of the Act). Together, these sections make it clear that applicants for hydropower licenses from the FERC must obtain state water right permits if state law so requires, and that the Federal Power Act does not preempt the operation of state water right laws.

None of the cases cited by permittee to oppose the Board's jurisdiction involved a challenge to a state's authority to regulate the appropriation of water by a licensee of the FERC. Rather, the cases address the authority of the FERC to issue a license. As we have stated above, we do not question the FERC's authority to license a hydropower project in California.

Throughout the history of the United States, Congress has consistently deferred to state water right laws. *California v. United States* (1978) 438 U.S. 645, 653, 98 S.Ct. 2985, 2990. Recognizing this deference and the clear language of Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), the United States Supreme Court in *California v. United States, supra,* held that the United States must obtain its water rights for the New Melones Reservoir on the Stanislaus River from the State of California, and must comply with the state-imposed terms and conditions on the appropriation of water. This decision disapproved dicta which had been assumed to be law regarding Section 8 in a series of cases. Prior to the decision in *California v. United States,* the United States had asserted that it could appropriate water for its reclamation project without complying with state law.

The language of Section 27 of the Federal Power Act is nearly identical to the relevant part of Section 8 of the Reclamation Act. Section 27 states:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821)

Similarly, Section 8 of the Reclamation Act of 1902 states in relevant part:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (42 U.S.C. § 383).[1]

Based on the Congressional Record, it is apparent that Section 27 of the Federal Power Act, adopted in 1920, is patterned after Section 8 of the Reclamation Act and is intended to require that developers of hydropower projects obtain their water rights under state law. Remarks of Senator Nelson, 59 Cong. Rec. 1040 (1920); 56 Cong. Rec. 9110-9115 (1918) (debate on an earlier version of the bill that became the Federal Power Act). The cases containing dicta (disapproved in *California v. United States*) which suggested a contrary result under the Reclamation Act were not decided until many years later, and cannot be used to imply an intent by Congress in 1920 to override state water laws. Rather, the prevailing view at the times when both acts were passed was that Congress already had passed laws sufficient to ensure that the states would always have control over water rights within their boundaries. *United States v. Rio Grande Dam & Irrig. Co.* (1899) 174 U.S. 690, 19 S.Ct. 770, *California Oregon Power Co. v. Beaver*

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[1] Another part of Section 8 is codified separately at 43 U.S.C. § 372.

Portland Cement Co. (1935) 295 U.S. 142, 55 S.Ct. 725, *California v. United States, supra.*

The leading case in the series of cases cited by permittee in support of its argument is *First Iowa Hydro-Electric Cooperative* v. *FPC* (1946) 328 U.S. 152, 66 S.Ct. 906. An examination of the *First Iowa* decision shows that the Iowa law under consideration was not a water right law. Rather, it involved the regulation of dams. Because no state water right law was involved, the court based its holding only on Section 9(b) and not Section 27 of the Federal Power Act, which specifically provides that the Federal Power Act does not affect or interfere with state laws regarding the control, appropriation, use or distribution of water.

However, the *First Iowa* court in dicta discussed Section 27 of the Federal Power Act. In its discussion, the court observed that Section 27 saves state laws regarding water rights from supercession by the Federal Power Act.

Based on the above considerations, we conclude that we have jurisdiction in this matter to regulate the Rock Creek Project, notwithstanding the concurrent exercise of jurisdiction over other aspects of the project by the FERC. Any differences from the FERC license should be handled by complying with the stricter terms and conditions.

3.2 *Permittee's Claim of Riparian Rights*

Permittee argues that it does not need a water right permit because it has riparian water rights. Therefore, permittee apparently contends that the Board should not exercise jurisdiction over the Rock Creek Project.

Permittee alleges that part of the Rock Creek Project is located on federal Bureau of Land Management ("BLM") land contiguous to Rock Creek and that the remainder of the project is located on land contiguous to Rock Creek that is owned in fee by permittee. Permittee further alleges that it has permission in its FERC license to use the BLM land including whatever riparian rights attach to it,[2] and that the downstream part of the BLM land has been privately owned. Permittee admits that the upstream part of the BLM land contiguous to Rock Creek never has been privately owned.

Assuming that all of the above factual allegations are true and that permittee's interpretation of the

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[2] We are unable to find any provision in the FERC's Order Issuing License for this project (No. 3189-003), issued April 29, 1983, which purports to authorize the permittee to use whatever riparian rights may be held by the Bureau of Land Management in the project area. The only provision therein referring to riparian rights is Order paragraph (B)iii, which defines certain properties and rights which are necessary to the operation or maintenance of the project as part of the project. Order paragraph (B)iii in no way can be read as a grant. Rather, it is a definition. If anything, its implication is that water rights are a necessary part of the project, to be acquired by the permittee.

FERC license is correct, it is our opinion that the permittee lacks sufficient riparian rights to operate the project. Therefore, permittee requires a permit to appropriate water.

First, the power generation entitlement of a riparian landowner is to the hydraulic effect of the natural flow of the stream measured by its drop from the highest point to the lowest point on his land. *Seneca Consolidated Gold Mine v. Great Western Power* (1930) 209 Cal. 206, 219, 287 Pac. 93. When water is used to generate power, the use made of the water is to develop and capture the force inherent in the fall of the water from one level to another. The force that results from the fall of water is dependent on the distance of the fall. Thus, a greater use can be made of water that falls a greater distance. However, a water right holder acquires only the right to the *use* of water. Water Code § 102. Therefore, if *Seneca, supra,* is correct as to the measure of a riparian landowner's right to use water to generate hydroelectric power, the Rock Creek Project has a riparian entitlement only to the drop of water from the highest point on the stream where the project has a possessory interest in the adjacent riparian land, to the lowest point where it possesses adjacent riparian land, but does not include the drop attributable to any intervening segment of the stream in which the project lacks a possessory interest or to which riparian rights are not attached. Therefore, if permittee's factual allegations are correct, permittee has a riparian right to use the hydraulic energy attributable to the fall of water in the creek on its own land

and, if the FERC license were correctly interpreted as allowing permittee to use any riparian rights attached to the BLM land, then permittee also would have a riparian right to use energy attributable to the part of the creek that flows through the BLM land that once was held in private ownership.[3] Even if riparian rights attach to the upstream portion of the BLM land, which has not been held in private ownership, we believe permittee must have appropriative rights to use the hydraulic energy attributable to this portion of the creek.

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[3] Based primarily on the holdings in *McKinley Bros. v. McCauley* (1932) 215 Cal. 229, 9 P.2d 298 and *Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 205 Pac. 36, we have previously taken the position that riparian rights do not attach to land until it is patented to private ownership. In *McKinley* and in *Rindge*, appropriative rights which were initiated prior to the patenting of certain riparian properties to private ownership were given priority over the riparian rights appurtenant to subsequently patented lands upstream. The basis for these holdings was that "riparian rights do not attach to land held by the government until such land has been transmitted to private ownership." *McKinley, supra.* 9 P.2d 299.

The question of whether the United States has riparian rights on lands which have never been held in private ownership was the subject of a recent opinion by the Court of Appeal, Third Appellate District. (*In the Matter of the Determination of the Rights of the Various Claimants to the Waters of Hallett Creek Stream System in Lassen County, California,* No. 3 CIV 24355). Our position in the Court of Appeal was that the United States Forest Service does not have riparian rights on its lands which never have been held in private ownership. The Court of Appeal disagreed with our position, and held that the United States has riparian rights which lack priority over any other user of water, whether the other user is using water now or will use it in the future. We are seeking review of this opinion.

Permittee argues that, even if it does not have a right to use the United States' water rights or even if the United States lacks riparian rights, permittee can go upstream from its riparian property to divert water for its hydroelectric project. Permittee bases its argument on several cases which allow a riparian landowner to go upstream to divert its water supply. The cited cases are distinguishable, however. Most of them are cases in which the water was to be put to consumptive use on riparian property. To the extent that a riparian right holder diverts water upstream of his property solely for convenience and does not put it to use by capturing the hydraulic energy in the water attributable to the upstream lands, we believe that the cited cases apply. However, wherever the riparian diverter for power purposes puts the water to use by capturing its hydraulic energy, it must have a water right appurtenant to the land on the part of the stream to which the energy is attributable. We reach this conclusion because when water is used in generating power, it is used for the purpose of developing a force which can be converted to electricity. Such a force is developed because of the topography of land adjacent to the stream, and the incremental addition of any part of the stream above the riparian property will add an incremental amount of force attributable to the upstream nonriparian property. The use of the fall of water attributable to the upstream property is subject to appropriation under Water Code § 1201.

3.3 *Permittee's Claim of Federal Reserved Water Rights*

Permittee argues that it does not need a water right permit because it has federally reserved water rights to use the water flowing in Rock Creek. Permittee apparently makes this argument as a further basis for contending that the Board should not exercise jurisdiction over the Rock Creek Project.

Permittee correctly points out that Section 24 of the Federal Power Act, at 16 U.S.C. § 818, includes the following language:

> "Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located."

Permittee interprets Section 24 as according permittee a federal reserved water right. However, no court in a reported case has ever held that Section 24 operates in combination with the reserved water rights doctrine to accord reserved water rights to a hydroelectric project. To the extent that reserved water rights have been implied to exist in connection with a hydroelectric project, the reservations of federal land were made under laws other than the Federal Power Act. *See*, e.g., *Federal Power Commission v. Oregon* (1955) 349 U.S. 435, 75 S.Ct. 832. Thus,

no holding exists that Section 24 can itself operate to reserve water.

Section 24 of the Federal Power Act must be read in context with other provision of the Act. Particularly, it must in this case be read with Sections 9(b) and 27 of the Act.

Section 9(b) provides:

> "Each applicant for a license under this chapter shall submit to the commission –
>
> * * *
>
> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." (16 U.S.C. § 802.)

More importantly, Section 27 provides:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821.)

Together, Section 9(b) and 27 clearly provide that a hydropower proponent must acquire water rights under the laws of the state, and that *nothing* in the

Federal Power Act is to be construed as interfering with state water right laws. Thus, the plain meaning of these sections is that Section 24 does not accord water rights to a hydropower licensee of the FERC. Since all three of these sections were enacted together in the original act, there can be no argument that Section 24 overrides the other sections.

As we found above in finding 3.1, Section 27 of the Federal Power Act is patterned on Section 8 of the Reclamation Act of 1902. Regarding the Reclamation Act section, the U.S. Supreme Court held that the United States must comply with state water right laws in obtaining water for its reclamation projects. *California v. United States* (1978) 438 U.S. 645, 98 S.Ct. 2985. Thus, if Section 27 is to be interpreted in the same way as Section 8 of the Reclamation Act, which it copies, it must be construed as requiring compliance with state water right laws, including Permits 19259 and 19260.

Based on the foregoing discussion, we conclude that permittee does not have federally reserved water rights that would eliminate the requirement that permittee obtain and comply with appropriative water rights under the California Water Code.

4.0 QUESTIONS OF PROOF

4.1 *Burden of Proof*

Permittee argues that the Department of Fish and Game, since it requested that the bypass flow requirements in Permits 19259 and 19260 be

amended, has the burden of proving that the bypass flows should be amended.

For the reasons stated below, we conclude that permittee and the Department each have the burden of proving the facts to support their own proposals for a minimum bypass flow. Each party must meet its burden by a preponderance of the evidence.

This case comes to the Board for decision on a condition in permittee's permits reserving jurisdiction. The reservation of jurisdiction was imposed by the Board in Decision 1596 when it approved issuance of the permits. As provided in Water Code § 1381, "The issuance of a permit gives the right to take and use water only to be extent and for the purpose allowed in the permit."

The reservation of jurisdiction, in Term 17(c), is to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels after evaluating the results of a study the permittee was required to conduct pursuant to Term 17(a). The bypass flow requirements in Term 16 are for 15 cubic feet per second from October 1 through April 30 and 11 cubic feet per second from May 1 through September 30.

The reasons for the reservation of jurisdiction and for setting the current bypass flow requirements are set forth in Decision 1596 at finding 7, pages 8 and 9. To summarize, the Board found that the instream flow study presented to the Board by the permittee's predecessor at the 1983 hearing was deficient in several important respects, and that because of the

deficiencies no valid basis existed for the minimum flow requirements set forth in Permit Term 16. However, the protestant (the Department of Fish and Game) agreed that the project could be approved with the 11 cfs/15 cfs minimum flows pending further study, if the Board reserved jurisdiction to change the flow requirements after the further study. These flows were matched to the interim flow requirements in the license issued by the Federal Energy Regulatory Commission. *See* Decision 1596, pp. 8-9.

Because no valid basis was provided at the 1983 hearing for the current minimum flow requirements, permittee's predecessor failed to meet its obligation to provide information to the Board concerning the effects of the appropriation on fish, under Water Code § 1260(j), and failed to demonstrate how much water actually is available for its appropriation after fishery needs are satisfied. (*See* Water Code § 1243).

Rather than deny the applications or defer a decision on them until a fishery study was done, the Board decided to approve the application subject to terms and conditions including Terms 16 and 17, in which the Board required a further fishery study and reserved jurisdiction. By approving the project, the Board relieved the permittee of the delays that would be involved in either reapplying for permits or having to wait for its permit while it did the additional fishery study.

Since the Board was satisfied that sufficient water would be available for the project after the bypass of

some flows for fishery and riparian vegetation protection (*see* finding 6.a. of Decision 1596), the question of the level at which to set the bypass flows was not a matter that would require a delay in approving the basic project. Rather, it was a question that would affect the amount of flow the project would have to bypass. (We recognize that the amount of the bypass affects the amount of water that may be passed through the project's generators, and thereby affects the amount of energy the project will produce and the amount of money it will earn. However, permittee made the decision to proceed with construction of the project notwithstanding the uncertainty as to the final bypass flow.)

This proceeding is not, as permittee suggests, a disciplinary or revocation proceeding. Such proceedings are conducted under Water Code §§ 1410 et seq. and 1825 et seq. This proceeding is instead an exercise of reserved jurisdiction under Permit Term 17. Exercises of reserved jurisdiction to amend permit terms and conditions are appropriate in the administration of water rights. *See United States v. State Water Resources Control Board*, (1986) 182 Cal.App. 3d 82, 227 Cal.Rptr. 161.

By its nature, a proceeding on reserved jurisdiction is a continuation of the original proceeding, for the purpose of adjusting the terms and conditions of water rights in response to new information and changing circumstances. *See* Water Code §1394.

Further, this proceeding does not threaten *in fact* to revoke a part of permittee's water right. Under Term

16, permittee's authorization to divert and use water was from its inception, and remains, subject to the needs of the Rock Creek fishery. The permit clearly shows that uncertainty exists as to the exact needs of the fishery and that further action may be taken after a fishery study. The permittee has no rights under the permit to take and use water beyond the authorization contained therein, and the permittee takes the permit subject to its conditions. Water Code §§ 1381, 1391. Also, the fishery is protected by the public trust doctrine, against which no one has a vested right. (*See National Audubon Society v. Superior Court*, 33 Cal.3d 419, 658 P.2d 709 (1983); *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 48 Pac. 374; and Decision 1596, page 8.) Thus, no threat exists that the permittee may lose something to which it has a right.

Permittee is generally correct that the moving party has the burden of proof in administrative proceedings. However, this rule varies when public policy considerations favor protecting a particular interest. *CEEED v. Calif. Coastal Zone Conservation Comm'n* (1974) 43 Cal.App.3d 306, 118 Cal.Rptr. 315, *State v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 156 Cal.Rptr. 542. In this case, public policy, including the public trust doctrine, favors the protection of fisheries in connection with the appropriation of water. Water Code §§ 386, 1243, 1260(j); *National Audubon* and *Truckee Lumber, supra*. To place the burden of proof that the current bypass flow requirement is inadequate on the party who seeks to provide the greater protection for the fishery would

favor the limitation or destruction of the fishery. Therefore, public policy considerations favor putting the burden on the permittee to prove that the 11 cfs/15 cfs bypass flow requirement is adequate to protect the fishery at the natural preproject level.

Further, since the bypass flow requirements were not finally determined and were established provisionally in Decision 1596, the affirmative case in the instant proceeding remains with the permittee to prove the correct bypass flow. Having failed initially to satisfy all of the requirements of an application, the permittee still has the burden of proving its assertions regarding the fishery's needs which it did not prove before. The Board in Decision 1596 determined that the appropriate bypass flow for Rock Creek would be the bypass flow that would protect the fishery in Rock Creek at the preproject level. (See Decision 1596, page 8, finding 7.b.) Consequently, permittee must prove that the fishery will be protected at preproject levels under the 11 cfs/15 cfs flow regime.

Finally, we note that the Evidence Code at § 500 provides that:

> "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

Since establishing the 11 cfs/15 cfs bypass flow requirement as the appropriate flow is essential to

permittee's case, permittee has the burden of proving that this is the appropriate requirement. Likewise, the Department of Fish and Game has the burden of proving that the 30 cfs/60 cfs bypass flows it recommends are appropriate.

4.2 *Standard of Proof*

Permittee asserts that the standard of proof in this case should be that of clear and convincing proof to a reasonable certainty. This argument is founded on the theory that permittee has a vested property right to the use of water in Rock Creek. Permittee cites in support of the theory that it has a vested right a general dictum in *United States v. State Water Resources Control Board, supra,* at 182 Cal.App.3d 101. However, the dictum states only the general rule and does not explain when rights are acquired to use water. Nor does it explain the limitations on either the extent of a water right or the extent of vestedness.

A permit to divert and use water is merely permission to commence the acquisition of an appropriative water right. As the California Supreme Court explained in *Temescal Water Co. v. Department of Public Works*:

> "A permit itself confers no appropriative rights but fixes the priority of its recipient over subsequent appropriators, Water Code §§ 1450-1456; it expressly provides that its issuance is subject to vested rights." *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.3d 90, 280 P.2d 1.

Subsequently, in *Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 340 P.2d 722, the Court of Appeal made this same point and elaborated on it as follows:

> "The final procedural step in perfecting a water right is the issuance of a license as prescribed in sections 1600 through 1677 of the Water Code. The issuance of a license is merely confirmatory of a right *acquired by use* in accordance with the permit.
>
> "On the issuance of a permit the permittee has the right to take and use the water to the extent allowed in the permit." (Emphasis added.)

Also see *Madera Irr. Dist. v. All Persons* (1957) 306 P.2d 886, 892, 47 Cal.2d 681; Hutchins, *The California Law of Water Rights* (1956), pp. 108-112; Water Code §§ 1455, 1600-1651.

Thus, an appropriative water right is acquired by taking water under control and putting it to beneficial use in accordance with a permit to appropriate the water and in accordance with the Water Code, Division 2, Part 2. After the water has been put to beneficial use, the Board issues a water right license which confirms the right to appropriate the amount of water which has been applied to beneficial use within the terms and conditions of the permit. Water Code § 1610. It is the responsibility of the appropriator to show that the claimed amount of water has been appropriated. Water Code § 1610.5.

In this case, no license has been issued confirming an appropriation of water pursuant to Permits 19259 and 19260. Further, there is no evidence in the record

that permittee has, since it acquired its permits, perfected a right to appropriate water up to the limits of its permits or for an amount less than that allowed in its permits. Since a permit legally is not evidence of a vested right to appropriate water, and nothing else in the record evidences the existence of a vested right, we conclude that permittee does not have a vested right. In fact, permittee appears to have just the bare permission to start acquiring a right. Under Water Code § 1455, the effect of issuance of a permit is limited: it continues the permittee's priority as of the date of the application and allows the permittee to take and use a specified amount of water for the life of the permit.

Even if, for sake of argument, permittee had a vested right in the sense of having perfected a water right, permittee nevertheless would have no vested right to take and use water needed to protect public trust values. *National Audubon, supra,* at 189 Cal.Rptr. 363-366; *United States v. State Water Resources Control Board, supra,* at 182 Cal.App.3d 106. Since, as we have noted above and in Decision 1596, the fishery is protected by the public trust, there can be no vesting of a right to harm it.

Generally, the proper standard of proof in cases where no fundamental vested right is involved is the preponderance of the evidence standard. *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 185 Cal.Rptr. 601. Also, it appears that few matters qualify as fundamental vested rights. Professional licenses of physicians, lawyers and dentists have been held to be fundamental

vested rights. However, continued employment and worker's compensation have not been held to have this stature, and have been subject to the preponderance standard and substantial evidence review. *Ettinger*, id. We conclude that changes in water right permits likewise are subject to the preponderance standard and substantial evidence review. *See Bank of America v. State Water Resources Control Board* (1974) 42 Cal.App.2d 202, 116 Cal.Rptr. 770.

5.0 HYDROLOGY OF ROCK CREEK

Three different estimates have been made a part of the hearing record to depict the hydrology of Rock Creek's watershed, for the Rock Creek Project. The three hydrologies estimates are (1) the September 1981 estimated hydrology by Sierra Hydrotech; (2) the October 1985 synthetic flow record by Ott Water Engineers, and (3) the April 1986 synthetic flow record by Ott Water Engineers.

Probably the most accurate way to predict the hydrology of a watershed is to use a continuous long-term record of flows within the watershed to develop statistical probabilities of future flow occurrences at the same location. However, no continuous long-term record of flows exists for Rock Creek. Therefore, the permittee and its predecessor have commissioned studies based on other methods.

5.1 *September 1981 Hydrology*

In the first study, Sierra Hydrotech used isohyetal maps to determine average annual precipitation, estimated a ration of runoff to precipitation and then computed average annual runoff. Sierra Hydrotech then developed estimates of average monthly runoff by first computing the percentage of average annual runoff that occurs each month on similar streams and then applying these percentages to Rock Creek. While this provides an estimate of *average* monthly runoff, "average" runoff seldom actually occurs as rainfall varies dramatically in this area. To develop flow-duration data for Rock Creek, Sierra Hydrotech compared the shape of flow-duration curves from other streams and then used one observed flow on Rock Creek, the accuracy of which is unknown, to extrapolate a curve for Rock Creek. We cannot determine from the evidence that this data is accurate or typical of Rock Creek. Therefore, we find that the only useful portions of this hydrology are the average annual and monthly runoff figures.

5.2 *Hydrologies Based on Synthesized Data*

The second and third hydrologies by Ott Water Engineers both were made by comparing measured flows on Rock Creek with long-term gage-recorded flows on other streams, to develop correlation factors. The correlation factors were then used to synthesize a long-term record for Rock Creek. This method is considered adequate if the two stream basins are

similar, and if their characteristics do not differ significantly.

The October 1985 synthetic hydrology used data from Oregon Creek and the April 1986 synthetic hydrology used data from Forest Creek. Table 1 compares the major characteristics of each of these watersheds with the Rock Creek watershed. Table 2 summarizes the effects of these characteristics on hydrology. The tables show that the differences between the watersheds are significant. Therefore, it is questionable whether the resulting synthetic hydrologies are representative of what will occur on Rock Creek.

5.2.1 *April 1986 Hydrology*

For the April 1986 hydrology, permittee did not present its methodology for calculating the synthetic flows from the raw data (i.e., the 14 measured flows from Rock Creek and the gaged streamflow records from Forest Creek). Consequently, we do not know the means by which the synthetic flows were developed. Additionally, we have been unable to reproduce the methodology to verify the accuracy of the synthetic flows based on the data.

TABLE 1

Comparison of Basin Characteristics

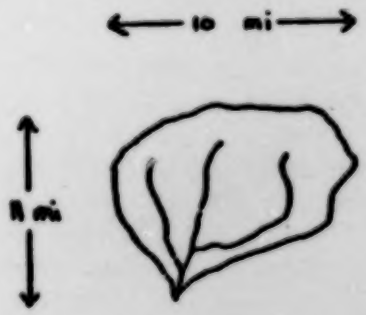
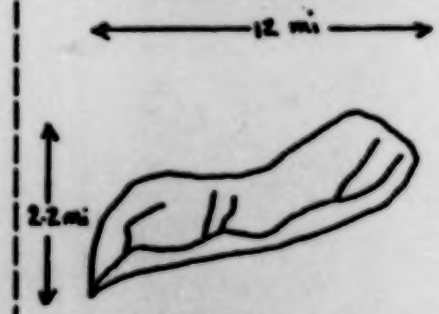
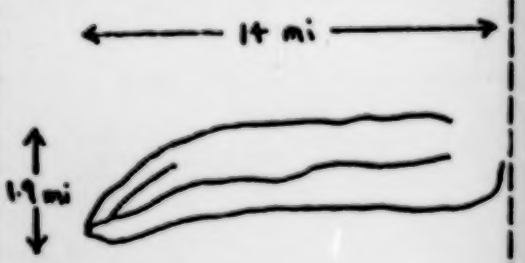
Element / Watershed	Rock Creek	Oregon Creek	Forest Creek
Area	68 sq. miles	23.0 sq. miles	20.8 sq.miles
width x length	10 mi. x 11 mi.	2.2 mi. x 12 mi.	1.9 mi. x 14 mi.
minimum elevation	1,300 ft.	2,230 ft.	2,950 ft.
maximum elevation	4,762 ft.	5,744 ft.	7,042 ft.
orientation	north to south	east to west	east to west
Dist. from Rock Creek	N/A	50 miles north	30 miles south
basin shape			

TABLE 2

(Effect of Watershed Characteristics on Hydrology)

CHARACTERISTIC	EFFECT		
	Rock Creek	Oregon Creek	Forest Creek
Basin Shape:	Large, heart-shaped basin with significant channel storage capacity. Storm induced runoff attenuated reducing maximum flows with low flows slightly higher and of longer duration.	Long, narrow basin with little channel storage. Runoff concentrated quickly to produce high peak flows that drop off quickly after storm passes.	Long, narrow basin with little channel storage. Runoff concentrated quickly to produce high peak flows that drop off quickly after storm passes.
Elevation:	Predominately below the snow-line. Little impact from snowmelt. Flows tend to decrease rapidly as soon as the storm season ends.	Fairly high elevation for lattitude. Significant amounts of snowmelt extend flows after winter storm season ends.	Fairly high elevation for lattitude. Significant amounts of snowmelt extend flows after winter storm season ends.
Orientation:	North-South orientation. Winter storms move from the northwest to the southeast and would tend to stay over the basin longer producing more effective precipitation and runoff.	East-west orientation. Winter storms move from the northwest to the southeast and can pass quickly over the basin if not stalled; producing less effective precipitation and runoff.	East-west orientation. Winter storms move from the northwest to the southeast and can pass quickly over the basin if not stalled producing less effective precipitation and runoff.
Geographic Location:	Located near the southern limit of the northern Sierra. Not all winter storms pass over this basin.	50 miles north of Rock Creek. This basin is located in the heart of the northern Sierra and most winter storms pass directly over the basin.	30 miles south of Rock Creek. This basin is located in the central Sierra and many storms either miss it or produce little effective precipitation.

Permittee has compared the April 1986 synthesized flows with 14 actual flow measurements from Rock Creek. The actual and synthetic flows show an extremely high degree of correlation. The correlation is unexpectedly high. Therefore, staff has attempted to verify the synthetic flows using the data supplied by the parties. However, the Board's staff was able to calculate the monthly correlation factors that permittee must have used to synthesize a flow record. Applying the factor for December, staff calculated a maximum flow of 7,257 cfs for Rock Creek. However, the April 1986 synthesized hydrology shows a maximum flow in Rock Creek of 999.9 cfs. Therefore, at least one unresolved inconsistency exists in the synthesized hydrology, and the accuracy of the hydrology cannot be verified. Permittee, therefore, has failed to demonstrate that the Forest Creek synthetic hydrology is representative of Rock Creek.

5.2.2 *October 1985 Hydrology*

Permittee did not provide much evidence regarding the synthetic hydrology based on Oregon Creek. Like the Forest Creek-based synthesis, no information was provided regarding the methodology for calculating the synthetic flows.

5.3 *Compiled Synthetic Hydrology*

All three hydrologies presented for Rock Creek have definite limitations. Because of the lack of

evidence to support them, we cannot with any confidence use any one of the synthetic hydrologies that have been presented to establish bypass flow requirements. However, all three of the hydrologies fall within a range. Notwithstanding that none of the hydrologies standing alone can reliably be considered to approximate Rock Creek's hydrology, the three when compiled provide a range within which substantial evidence shows that the actual hydrology exists. This range is depicted in Tables 3 and 4 and in Figures 1 and 2.

5.4 *Reserved Jurisdiction*

Since the compiled hydrology is based on several sets of data, it is possible that the permittee will want to develop a more exact hydrology for Rock Creek, for use in reevaluating the bypass flow requirements in the future. Therefore, we will continue the reservation of jurisdiction in Permits 19259 and 19260 to amend the bypass flow requirements set forth in the permits. If a change is requested in the bypass flow based on a new hydrology, we will require the party providing the new hydrology to also provide sufficient documentation so that we may verify the data.

6.0 ADEQUACY OF THE FISHERY STUDIES PERFORMED BY PERMITTEE

The first key issue listed in the Water Right Hearing Notice dated March 28, 1986 was, "Has the permittee performed the fisheries habitat study as required by terms 17a and 17b?"

TABLE 3

ROCK CREEK COMBINED HYDROLOGY
Average Monthly Flows (cfs)

Month	Low	High	Ave.
Oct	10.8	20	16.3
Nov	38	78	51.7
Dec	78	120.9	101.3
Jan	147.1	250	183.4
Feb	173	215	191.2
Mar	202.7	232	212.9
Apr	172.1	217	194
May	71	94	85.3
Jun	29.1	46	38.4
Jul	10.9	31	20.6
Aug	4.9	22	14
Sep	5.9	17	12.3
Ann. Ave.	82.7	109.7	92.8

TABLE 4

ROCK CREEK COMBINED HYDROLOGY
Annual Percent Exceedence Curves

Percent of time flow exceeded	Flow (cfs)		
	Low	High	Ave.
20	95	177	134
25	70	134	115
30	55	118	82.3
35	45	86	63
40	38	67	50.3
45	30	53	40.3
50	25	44	33.7
55	21	36	28
60	17	30	23.3
65	14	24	18.7
70	10	20	15.7
75	8	18	14
80	5	16	11.7
85	4	14	10
90	3	13	8.7
95	2	9	6
100	0	0	0

FIGURE 1

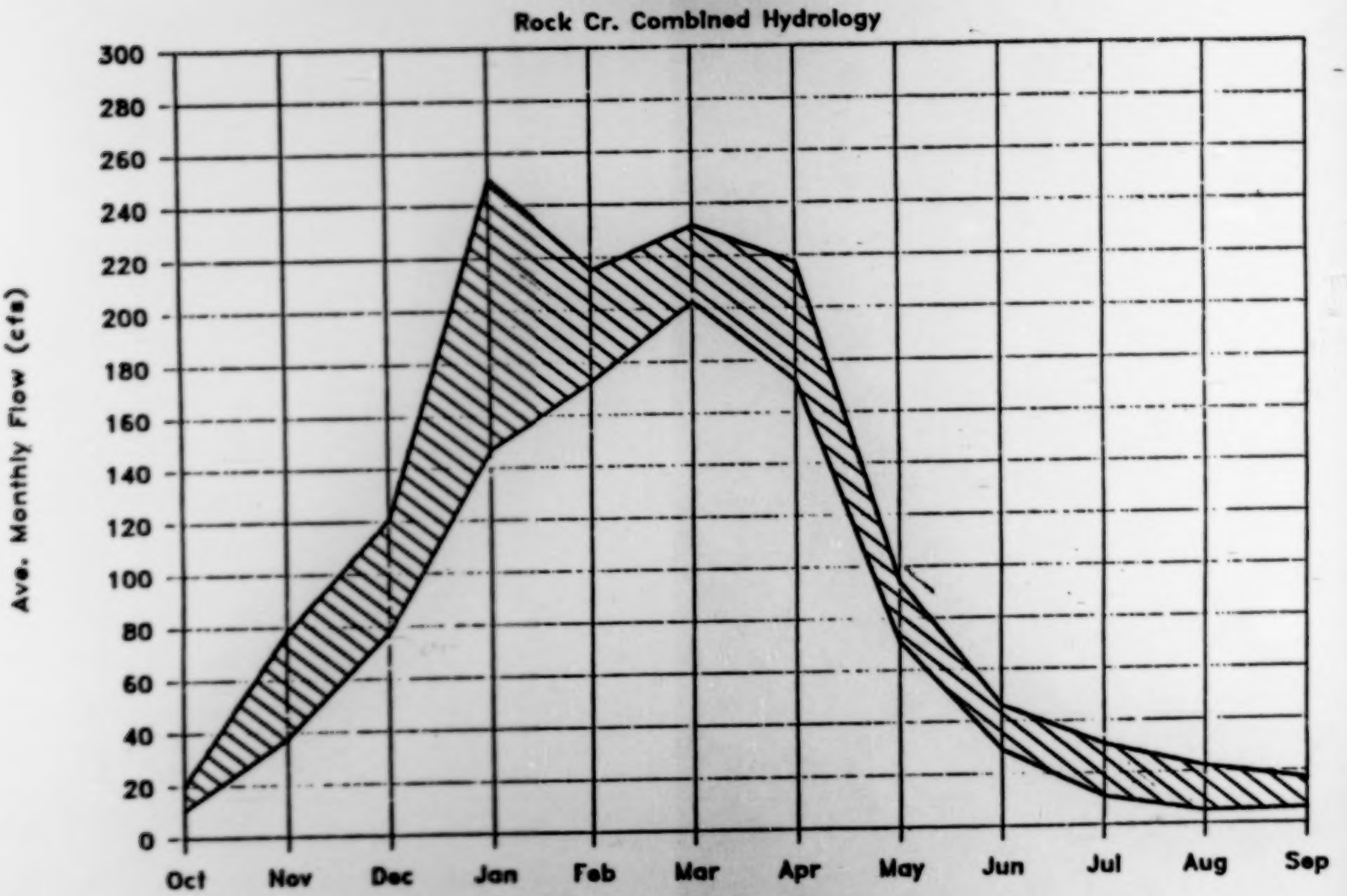
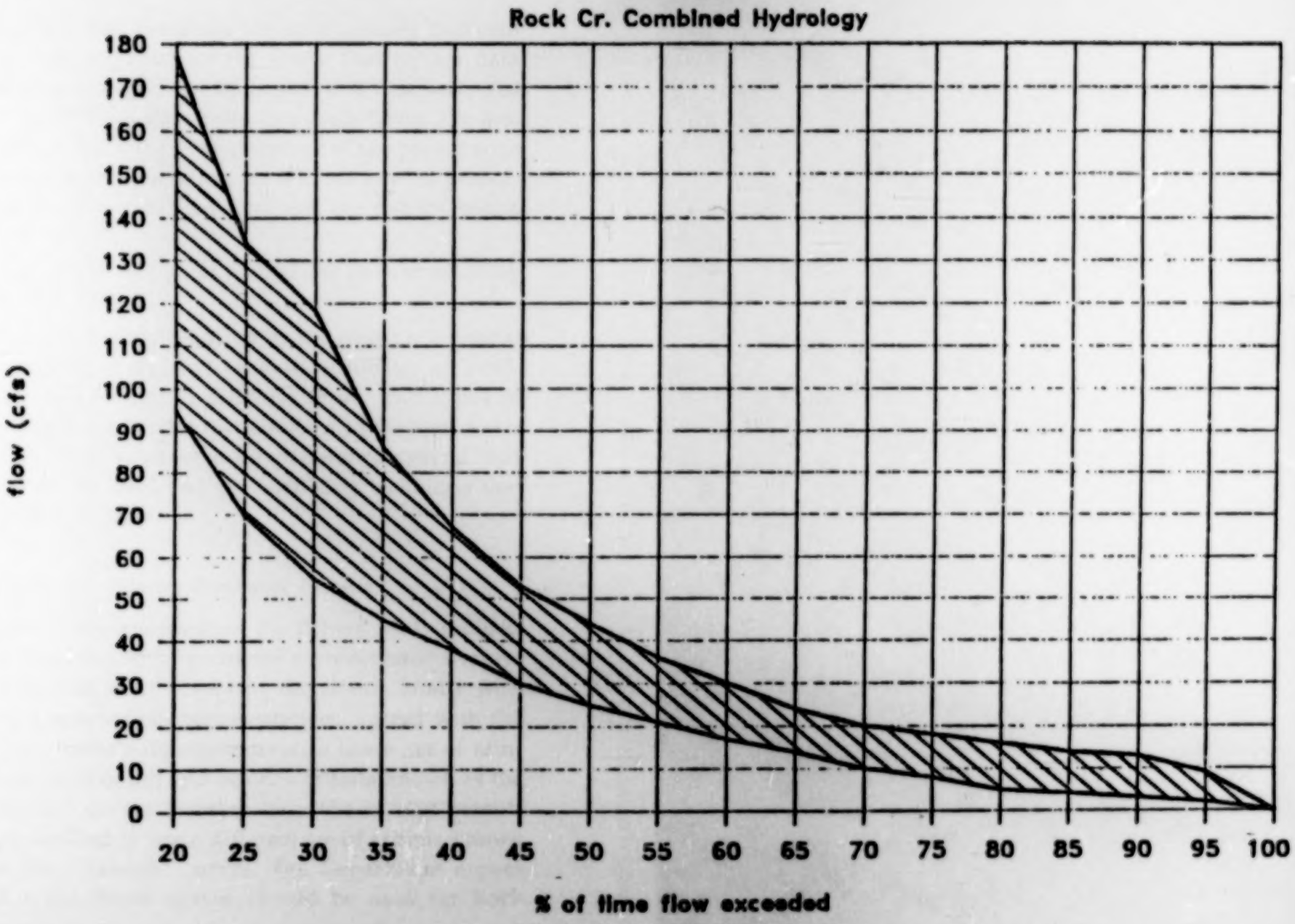

Rock Cr. Combined Hydrology
Ave. Monthly Flow (cfs)
300
280
260
240
220
200
180
160
140
120
100
80
60
40
20
0
Oct
Nov
Dec
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep

FIGURE 2


Rock Cr. Combined Hydrology
flow (cfs)
180
170
160
150
140
130
120
110
100
90
80
70
60
50
40
30
20
10
0
20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
% of time flow exceeded

6.1 *Compliance With Data Collection Requirements*

We find that Permittee has substantially collected the data required for the study, that further data collection would not be useful, and that variances in permittee's data collection from terms 17a and 17b did not impair the purposes of the permit term requirement. Therefore, we will not require permittee to collect further data for the fishery study.

6.2 *Appropriate Analytical Method for Habitat Modeling in Rock Creek*

The IFG-4 study required by the Board is a habitat modeling study that provides estimates of available fish habitat at different flows. Two types of methods for habitat modeling are in dispute in this case – the rainbow trout preference criteria that should be used and the modeling technique that should be used.

6.2.1 *Depth and Velocity Preference Criteria*

Upon commencement of the fishery study ordered by Decision 1596, permittee's predecessor's representatives, after observing the stream jointly with the Department's representatives, agreed with the Department's representatives to use a set of rainbow trout depth and velocity criteria known as the "Bovee" curves. Subsequently, the current permittee decided to use a different set of criteria known as the "Raleigh" curves. The Department argues that the Bovee curves should be used for Rock

Creek. The primary difference between the two sets of criteria lies in the velocity curves for the two sets of criteria.

The Raleigh curves generally indicate that rainbow trout prefer lower water velocity than is indicated by the Bovee curves. The Bovee curves are more in agreement with habitat preference data from the Sierra than the Raleigh curves to predict the flow and depth conditions an adult rainbow trout will select. Much of the selection of one or the other of the two curves to analyze a particular stream is dependent on the observations and experience of fisheries biologists with the subject stream and with similar streams in the same geographical area. The fisheries witnesses for the Department have had more extensive and longer term experience with the Rock Creek rainbow trout fishery and the fisheries of other streams in that geographical area than have either of permittee's fishery biology witnesses. The Department's four fishery biology witnesses had at the time of the hearing approximately four years, four years, three years, and three years experience, respectively, with the stream when the hearing commenced. Permittee's witnesses each had had less than a year's experience with the stream, and one of them had less than three months' experience with it. For a fisheries biologist to observe a stream at all times of the year before making predictions about it is especially valuable. Not only have Department's witnesses had much more experience with Rock Creek

than the permittee's witnesses, but also the experience of the Department's witnesses in the area of the Sierra where Rock Creek is located is much more extensive than that of the permittee's witnesses. The Department's judgment in matters of protecting fish life is entitled to great weight in the Board's proceedings. *Bank of America, supra,* at 116 Cal.Rptr. 778-779.

The opinions of the Department's witnesses that the Bovee curves more closely fit the situation in Rock Creek is corborated by a fish habitat study on Deer Creek by Moyle and Baltz (permittee's exhibit 4, P-61), which is similar to Rock Creek in fish assemblage and temperature regime. Both of these characteristics are important to evaluation of flow and depth preferences. Deer Creek data more closely support the Bovee adult curve, support neither curve for juvenile fish, and more closely support the Raleigh fry curve.

Thus, neither proposed set of curves appears completely representative of Rock Creek for all life stages. The Bovee adult and juvenile curves are more applicable to Rock Creek, and it is uncertain which fry curves are more applicable.

6.2.2 *Modeling Technique*

Permittee used the IFG-4a modeling technique rather than the IFG-4 modeling technique specified in the permits at term 17a. The IFG-4a technique produces results comparable to the IFG-4 modeling

technique using the Rock Creek data. Therefore, we will accept the results of the IFG-4a modeling technique.

7.0 BYPASS FLOW REQUIREMENT

Permittee argues that the provisional bypass flow requirements set forth in the permits at term 16, 11 cfs from May through September and 15 cfs from October through April, are sufficient to protect the fishery resources of Rock Creek at natural preproject levels. The Department argues that bypass flows of 30 cfs from October through February and 60 cfs from March through September are needed to protect the fishery resources at natural preproject levels. The issues are, (1) whether a "pinch period" operates to reduce the rainbow trout population during the lowest natural flow period in the summer, so that reduction of flow and habitat during other times of year by the project to the "pinch period" level would not adversely affect the fish population more than the effect of the natural "pinch period"; (2) whether the Tennant method should be used to determine the flows needed to protect the fishery resources; (3) how observations of Rock Creek should be applied; (4) which fishery modeling analyses should be used.

7.1 *Fishery Habitat Modeling Analyses*

We have assumed for purpose of evaluating the modeling analyses that the "average" values listed

in Table 3 approximate the mean monthly flows in Rock Creek. Using these flows, the Board's staff has compared the results of the IFG-4a modeling, applying the Raleigh and the Bovee sets of criteria to the results.

7.1.1 *Effect of the Two Sets of Minimum Flows on the Adult Life Stages*

The adult life stage is important in Rock Creek because the adult stage is the object of angler harvest, and because it is necessary for adults to exist to spawn and perpetuate the population. Using either the Bovee or the Raleigh curves the minimum flows recommended by the Department preserve more fishery habitat for adults than the minimum flows recommended by permittee.

7.1.2 *Effect of the Two Sets of Minimum Flows on the Juvenile Life Stage*

Using either the Bovee or Raleigh curves, the minimum flows recommend [sic] by the Department provide more habitat for juveniles than the minimum flows recommended by the permittee. Under the Bovee curve, which is more applicable to Rock Creek, more habitat is protected by the Department's minimum flows, than by the minimum flows permittee recommends. Although the Raleigh curve suggests that the flows recommended by both permittee and the Department would enhance juvenile habitat in some months, we find that no enhancement of juvenile habitat

actually would occur at these flows. Further, the low flows supported by the Raleigh juvenile curves would cause severe losses to the adult and spawning life stages.

7.1.3 *Effects of the Two Sets of Minimum Flows on the Fry Life Stage*

The Bovee curve shows that the minimum flows recommended by the Department would preserve all of the preproject fry habitat, and that the minimum flows recommended by the permittee would cause large losses of habitat. However, the Raleigh curve shows that the Department's minimum flow recommendation would provide less habitat than the permittee's minimum flow recommendation. Thus, the two sets of criteria are contradictory with regard to the effect on fry of the different flow rates.

7.1.4 *Effects of the Two Sets of Minimum Flows on the Spawning Life Stage*

Both sets of criteria show reductions in spawning habitat under the minimum flows recommended by both permittee and the Department. However, the reductions in habitat are greater under the permittee's minimum flow recommendations, and the Raleigh curves show no spawning habitat under permittee's minimum flow recommendation. Maintenance of spawning habitat is essential to the

preservation of a fishery. In order to preserve habitat for spawning, the Department's recommendation for minimum flow should be followed during the spawning period.

7.2 *Applicability of the Pinch Period Concept*

The primary basis for the permittee's minimum flow recommendation is that naturally low flows in August, September and October currently limit the population of adult rainbow trout in Rock Creek to those adults which can find habitat during those months. We have no evidence that low summer flows in fact cause adult trout to emigrate from Rock Creek; nor do we have evidence that they do not emigrate. Fishery ecology in streams such as Rock Creek is complex, and limiting factors may change depending on factors other than streamflow.

Assuming that a pinch period occurs, however, the permittee's minimum bypass flow recommendations would provide less habitat for adult trout in May and June than is available during the alleged natural pinch period. As a result, permittee's recommended flows of 11 cfs and 15 cfs would cause an adverse impact on the adult trout population in the months before August in all normal and above-normal water years; i.e., about 50 percent of all years. If a higher bypass flow of 17 cfs were required (permittee has indicated a willingness to

accept a 17 cfs bypass flow), the adult trout population would be adversely affected in above-normal water years. With a higher minimum bypass flow, more adult trout could remain in the system and available for harvest for a longer period each year, whereas the flow recommended by permittee could limit the adult trout population at any time of year. Preservation of the normal harvest period is a primary incident of the maintenance of a fishery. Therefore, the Department's recommendation of 30 cfs and 60 cfs will better protect the preproject fish population if the pinch concept applies.

7.3 *Applicability of the Tennant Method*

The Tennant method is a widely accepted procedure to determine minimum flows that will protect fisheries. It uses percentages of the mean annual flow of the stream to estimate the needed minimum instream flow. It is applicable to streams such as Rock Creek in which only the natural flow is available to supply a minimum downstream flow requirement. If it were used more specifically than it was used herein by the Department, it would have to be calibrated. However, the Department supports use of this method only as a starting point in combination with several other analytic methods.

The results of the fishery habitat modeling analyses confirm the conclusions reached under the Tennant method by showing that the bypass

flows derived under the Tennant method protect habitat for important life stages of trout.

However, the results of applying the Tennant method do not coincide with hydrologic conditions in Rock Creek in July through September. During those months the natural flow rarely exceeds 30 cfs, and even more rarely reaches the 60 cfs recommendation for those months based on the Tennant method. Therefore, the flow bypass requirement should not be more than 30 cfs during those months.

The Tennant method recommends maintenance of 60 percent of the average flow during the primary periods of growth and 30 percent of average flow during other periods. Since the spring months are the months of primary growth, it is appropriate under the Tennant method to require bypass of 60 percent of the average flow during those months. the [sic] Department's recommended minimum bypass flows are based on requiring 30 percent and 60 percent of a mean annual flow of 100 cfs. Based on the hydrologic analysis for Rock Creek, the mean annual flow is between 82.7 cfs and 109.7 cfs. Therefore, bypass recommendations under this method could range from 25 cfs and 50 cfs to 33 cfs and 66 cfs. Thus, after the actual mean annual flow for Rock Creek becomes known, the bypass flows may be varied.

7.4 *Maintaining the Fishery*

Permittee's recommended bypass flows would greatly reduce the fishery habitat in Rock Creek. As a result, major reductions in fish population are likely. With reductions in population and habitat, a reduction in fish harvest is likely. During low flow periods late in summer, fish have few hiding places and become wary and difficult to catch. If the flows recommended by permittee were instituted, fishing success would be severely reduced. On the other hand, the Department's flow recommendations likely will substantially maintain the preproject fishery.

7.5 *Fishery Recruitment to South Fork American River*

The Board found in Decision 1596 that "Rock Creek is important because it provides fishery recruitment to the South Fork American River. . . ." Permittee's recommended minimum bypass flows would substantially reduce the adult and spawning habitat in Rock Creek compared with the Department's recommended flows. Therefore, the Department's recommended flows will better protect fishery recruitment to the South Fork American River.

7.6 *Required Flow*

The various considerations discussed above more strongly support the Department's minimum flow

recommendations, for the purpose of maintaining the fishery resource at natural preproject levels. The Department's recommendation would better protect the adult, juvenile and spawning habitats. It also would maintain a harvestable adult fishery for a longer period into the summer and throughout the year. Further, the Department's recommendation would avoid significant reductions in rainbow trout habitat and population, would protect angler harvest and recruitment to the South Fork American River, and would come much closer than permittee's recommendation to protecting the fishery at natural preproject levels.

8.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Board as lead agency prepared and approved a mitigated negative declaration for the Rock Creek Project in accordance with the requirements of the California Environmental Quality Act (CEQA) (Public Resources Code §§ 21000 et seq.) before it adopted Decision 1596. The action herein applies to the same project, and since it will substantially maintain the fishery resources at natural preproject levels, it will not cause a significant adverse impact on the environment. Therefore, no additional CEQA document is required for the action herein.

After the Board adopts this order it will file a Notice of Determination with the Secretary for Resources. Consideration of the Mitigated Negative Declaration and Initial Study, inclusion of

terms and conditions in the permits to carry out the Negative Declaration's mitigation measures, and filing of the Notice of Determination will satisfy the Board's responsibilities under CEQA.

9.0 OTHER MATTERS

Permittee raised two other matters in its brief. First, permittee requested a finding under 23 California Administrative Code § 729.[4] Second, permittee asserted that it should have been allowed to rebut the Department's presentation during the rebuttal phase of correspondence with two fisheries experts at the University of California at Davis and Oregon State University.

9.1 *Section 729 Finding*

Permittee's request for a finding under this section is denied. This section requires the Board upon the request of a party in a proceeding respecting an application to appropriate water, to identify and evaluate the benefits and detriments, including economic and environmental factors, of the various present and prospective beneficial uses of the waters involved and alternative means of satisfying or protecting such uses. The permittee did not make its request for a finding under this section

[4] Effective February 15, 1987, Section 729 of Title 23, California Administrative Code, was revised and renumbered as Section 756.

until it filed its closing statement, long after the evidentiary record was closed. During the hearing, permittee failed to provide adequate evidence upon which such a finding could be based.

Additionally, weighing of beneficial uses such as is suggested by Section 729 was not a subject or issue of the hearing. Such a request would have been proper in the hearing leading to Decision 1596. Since the recent hearing was narrowly drawn to consider only specified issues under a reservation of jurisdiction and not the questions relevant to approving an application, the issue of the relative importance of the project compared with the fishery is not an appropriate consideration herein and, additionally, already has been decided in favor of protection of the fishery resource at the natural preproject level.

9.2 *Permittee's Request to Rebut the Department's Rebuttal*

During the period for introducing rebuttal evidence the Department offered in evidence two letters from fisheries experts regarding the Rock Creek Fishery. Permittee insists that it has a right to rebut the information contained in these letters, and cites several sections from the California Administrative Procedure Act. The Department offered the two letters as rebuttal of some of permittee's evidence, and not as original evidence to support its main case. The letters are accepted in evidence.

Permittee is incorrect in asserting a right to rebut the Department's rebuttal. First, no provision of law requires that a party in a water right hearing be allowed to introduce surrebuttal evidence. Second, the sections of the Administrative Procedure Act cited by permittee do not provide a right to surrebuttal, and do not apply to the Board's proceedings.[5] The Board's proceedings are governed by the Water Code and by the provisions in the Board's regulations at 23 Cal.Adm.Code §§ 648-648.8 and 761-766.

Finally, no provision requires prior notice of exhibits offered in rebuttal. Permittee obviously understood this point, since permittee offered several exhibits during its rebuttal without having previously provided them to the Department and the Board.

The letters in question are hearsay, and can only be used to supplement or explain other evidence. They are not sufficient in themselves to support a finding. 23 Cal.Adm.Code § 648.4. Additionally, it is questionable exactly what the statements in the letters mean, in light of the uncertainty over what the experts were told and what their assumptions

[5] Government Code § 11501 lists the Department of Water Resources as an agency whose proceedings are subject to the Administrative Procedure Act. The Board is a separate agency from the Department, and in fact regulates the water rights of the Department. Apparently, permittee has confused the two agencies in asserting the the [sic] Administrative Procedure Act applies to the Board's water right proceedings.

were. Therefore, we have not relied on the letters in reaching our decision.

10.0 CONCLUSION

Based on the foregoing findings, the Board concludes that Permits 19259 and 19260 issued on Applications 26380 and 27353 should be amended to increase the minimum bypass flow requirement to 30 cfs from July through February and 60 cfs from March through June. Higher high flow requirements may be needed; however, we lack adequate evidence to decide upon a higher requirement. Since the minimum bypass requirements are being raised, permittee may have to install a different measuring device to measure the bypassed flows. Therefore, we will continue to require that permittee install a device that will measure the bypassed flows.

Terms 17a and 17b are no longer needed. Consequently we will delete them. However, we will continue present Term 17c (the reservation of jurisdiction) because further information may show that a different set of minimum bypass flows would be appropriate.

ORDER

IT IS HEREBY ORDERED that Permits 19259 and 19260 shall be amended as follows:

1. Term 16 in both permits is amended to read:

"For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

a. From July 1 through February 29, a minimum of 30 cubic feet per second;

b. From March 1 through June 30, a minimum of 60 cubic feet per second;

c. The total streamflow shall be bypassed whenever it is less than the amount designated for that period.

"No water shall be diverted under this permit unless a device, satisfactory to the State Water Resources Control Board, is installed and is operating which is capable of measuring these bypass flows."

2. Term 17 in both permits is amended to read:

"The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after notice to interested parties and opportunity for hearing."

3. All other terms and conditions contained in Permits 19259 and 19260 shall remain unchanged and in full force and effect.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a

meeting of the State Water Resources Control Board held on MAR 19 1987.

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None

/s/ Maureen Marché
Maureen Marché
Administrative Assistant to the Board

9. MOTION REQUESTING JUDICIAL NOTICE

No. 87-7538

In the
UNITED STATES COURT OF APPEALS
for the Ninth Circuit

STATE OF CALIFORNIA *EX REL.*
STATE WATER RESOURCES CONTROL BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

ROCK CREEK LIMITED PARTNERSHIP,

Intervenor.

On Petition for Review of Orders of Federal Energy Regulatory Commission Regarding Project No. 3189

MOTION REQUESTING JUDICIAL NOTICE

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Attorneys for Intervenor

ROCK CREEK LIMITED PARTNERSHIP

Pursuant to Federal Rule of Evidence 201 and Federal Rule of Appellate Procedure 27, the Rock Creek Limited Partnership ("the Partnership") requests this Court to take judicial notice of the following federal court filings:

In *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946):

1. Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia, filed by First Iowa Hydro-Electric Cooperative on Nov. 13, 1945. A copy of this document is attached to this motion as Exhibit A.

2. Memorandum for the Federal Power Commission, filed by the Solicitor General on Dec. 18, 1945. A copy of this document is attached to this motion as Exhibit B.

3. Intervenor's Resistance to Petition for Certiorari to the United States Court of appeals for the District of Columbia, filed by State of Iowa on Dec. 4, 1945. A copy of this document is attached to this motion as Exhibit C.

4. Brief for First Iowa Hydro-Electric Cooperative, filed on Feb. 2, 1946. A copy of this document is attached to this motion as Exhibit D.

5. Brief for the Federal Power Commission, filed on Mar. 7, 1946. A copy of this document is attached to this motion as Exhibit E.

6. Brief for State of Iowa, Intervenor, filed on Feb. 27, 1946. A copy of this document is attached to this motion as Exhibit F.

7. Reply Brief for First Iowa Hydro-Electric Cooperative, filed on Mar. 6, 1946. A copy of this document is attached to this motion as Exhibit G.

8. Reply Brief for State of Iowa, Intervenor, to Brief for Federal Power Commission, filed on Mar. 6, 1946. A copy of this document is attached to this motion as Exhibit H.

9. Petition for Rehearing by State of Iowa, Intervenor, filed on May 22, 1946. A copy of this document is attached to this motion as Exhibit I.

In *Rock Creek Limited Partnership v. State Water Resources Control Board*, No. S-87-0523 (E.D. Cal. filed Apr. 9, 1987):

10. Complaint for Injunctive and Declaratory Relief, filed Apr. 9, 1987. A copy of this document, without exhibits, is attached to this motion as Exhibit J.

11. Stipulation of Facts and Authenticity of Documents, dated Aug. 21, 1987 and filed with the Court shortly thereafter. A copy of this document, not including appendices, is attached to this motion as Exhibit K.

12. Order (Staying Proceedings until Resolution of State Water Board's Appeal to the Ninth Circuit), filed Apr. 22, 1988. A copy of this document is attached to this motion as Exhibit L.

This motion is supported by the accompanying Memorandum of Points and Authorities; the attached Declarations of Gabriele Loebbert and Louis Touton; the Exhibits to this motion; and all pleadings and documents previously filed with this Court.

DATED: June 20, 1988

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

By/s/Louis Touton
Louis Touton
Attorneys for Intervenor
Rock Creek Limited Partnership

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

Intervenor Rock Creek Limited Partnership requests this Court to take judicial notice of twelve documents contained in the records of the United States Supreme Court and the United States District Court for the Eastern District of California.

Nine of the documents are the parties' filings in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946). These documents demonstrate the arguments made and Questions Presented to the Court in that case. The other three documents consist of the Complaint, Stipulation to Facts and Authenticity of Documents, and Order Staying Proceedings in a parallel action pending between the Intervenor and the Petitioner in this case, *Rock Creek Limited Partnership v. State Water Resources Control Board* (E.D. Cal. No. S-87-0523). These documents indicate the status of that action as well as the stipulations of facts entered into by the parties.

This Court may take judicial notice of these documents pursuant to Federal Rule of Evidence 201, which

provides that judicial notice may be taken of any facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2). Judicial notice may occur at any stage of the proceeding and becomes mandatory where the requesting party has provided the Court with the necessary information. Fed. R. Evid. 201(d), 201(f).

It is well established that courts will take judicial notice of materials in court files. *See, e.g., MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (on appeal from dismissal for failure to state a claim, court of appeals took judicial notice of motion to dismiss and supporting memorandum); *United States v. Author Services, Inc.*, 804 F.2d 1520, 1523 (9th Cir. 1986) (court took judicial notice of hearing in a related case). *See also MacMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580, 557-88 (5th Cir. 1985); *Anderson v. Cramlet*, 789 F.2d 840, 845 (10th Cir. 1986).

In the present case, the Partnership is requesting this Court to take judicial notice of the briefs, petitions for certiorari and rehearing and responsive filings in *First Iowa* and the complaint, stipulation of facts, and stay order in *Rock Creek Limited Partnership*. The Partnership submits this request for judicial notice for the purpose of demonstrating the status, arguments made, questions presented, and stipulations in those cases. These documents therefore comply with the requirements of Federal Rule of Evidence 201 and are appropriate for judicial notice by this Court.

Dated: June 20, 1988

JONES, DAY, REAVIS & POGUE

By /s/ Louis Touton
Louis Touton
Attorneys for Intervenor
Rock Creek Limited
Partnership

[The Declaration of Gabriele Loebbert, relating to authenticity of Exhibits A – J, is omitted.]

DECLARATION OF LOUIS TOUTON IN SUPPORT OF INTERVENOR'S MOTION FOR JUDICIAL NOTICE

I, Louis Touton, declare as follows:

1. I am an attorney licensed to practice before the bar of this Court and am associated with the law firm of Jones, Day, Reavis & Pogue, attorneys for intervenor Rock Creek Limited Partnership ("the Partnership") in this matter.

2. I have acted as counsel of record for Rock Creek Limited Partnership in *Rock Creek Limited Partnership v. State Water Resources Control Board* (E.D. Cal. No. S-87-0523) since that action was filed on April 9, 1987. As such, I am familiar with the documents filed in that case and make this declaration on that basis.

3. Attached as Exhibit J to this Motion for Judicial Notice is a true and correct copy of the Complaint (without exhibits) in *Rock Creek Limited Partnership v. State Water Resources Control Board*, (E.D. Cal. No. S-87-0523) (the "Action"), filed on April 9, 1987.

4. Attached as Exhibit K to this Motion for Judicial Notice is a true and correct copy of the Stipulation of Facts and Authenticity of Exhibits (without appendix) entered by the Partnership and the State Water Board in the Action on August 21, 1987, and filed with the Court shortly thereafter.

5. Attached Exhibit L to this Motion for Judicial Notice is a true and correct copy of an order of the Court in the Action received by me shortly after April 25, 1988.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of June, 1988 at Los Angeles, California.

/s/ Louis Touton
Louis Touton

6056d

[Exhibits A – J and L are omitted; Exhibit K follows:]

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ROCK CREEK LIMITED PARTNERSHIP

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROCK CREEK LIMITED PARTNERSHIP, a California limited partnership, Plaintiff, v. STATE WATER RESOURCES CONTROL BOARD, an agency of the State of California; DARLENE E. RUIZ, EDWIN H. FINSTER, W. DON MAUGHAN, DANNY WALSH, ELISEO M. SAMANIEGO, members of the State Water Resources Control Board; DEPARTMENT OF FISH AND GAME, an agency of the State of California; and JACK C. PARNELL, JAMES D. MESSERSMITH, PETER BONTADELLI, and JERRY L. MENSCH, of the Department of Fish and Game, Defendants.	CASE NO S-87-0523-LKK STIPULATION OF FACTS AND AUTHENTICITY OF DOCUMENTS

Plaintiff Rock Creek Limited Partnership and defendants State Water Resources Control Board, Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh, and Eliseo M. Samaniego, through their respective attorneys of record, stipulate that the following matters may be deemed true for purposes of this action only, but shall be without prejudice to any evidentiary objection based on relevance:

1. Plaintiff Rock Creek Limited Partnership (the "Partnership") is a limited partnership organized and existing under the laws of the State of California.

2. Defendant California State Water Resources Control Board ("State Water Board") is a government agency of the State of California. Pursuant to California law, the State Water Board is responsible for the administration and enforcement of the water right and water quality provisions of the California Water Code.

3. Defendants Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh, and Eliseo M. Samaniego are the members of the State Water Board.

4. In an application filed with the Federal Energy Regulatory Commission ("FERC") on June 1, 1982, Joseph M. Keating ("Keating") proposed development of a hydroelectric generating facility on lower Rock Creek, El Dorado County, California (the "Project"). On April 29, 1983, FERC approved the Project in its Order Issuing License, Project No. 3189-003, ("FERC License"), a true and complete copy of which is designated as Exhibit 1 in the appendix to this stipulation.

5. On May 22, 1980 and June 4, 1982, respectively, Keating filed Applications 26380 and 27353 with the State

Water Board for permits to appropriate water to operate the Project. The State Water Board held a hearing on these applications on September 14, 1983. It approved the issuance of permits in a decision dated February 16, 1984. On June 12, 1984, the State Water Board issued to Keating Permits 19259 and 19260 to appropriate water for the Project. These permits established interim bypass flow levels identical to those set forth in the FERC License, subject to reserved jurisdiction for subsequent reconsideration. True and complete copies of the following documents filed with the State Water Board in connection with that hearing and decision are designated as exhibits in the appendix to this stipulation:

Exhibit 2: Application No. 26380.

Exhibit 3: Application No. 27353.

Exhibit 4: Notice of Hearing to be held September 14, 1983, dated August 24, 1983.

Exhibit 5: Transcript of September 14, 1983 hearing.

Exhibit 6: State Water Board Staff Analysis of Record of Applications 26380 and 27353, dated December 12, 1983.

Exhibit 7: State Water Board Decision 1596, issued February 16, 1984.

Exhibit 8: State Water Board Order WR 84-6, Amending and Affirming Decision 1596 and Denying Petitions for Reconsideration, dated May 17, 1984.

Exhibit 9: Permit No. 19259 to appropriate water, issued by the State Water Board on June 12, 1984.

Exhibit 10: Permit No. 19260 to appropriate water, issued by the State Water Board on June 12, 1984.

6. The Partnership purchased the Project from Keating in April 1985, purchasing at the same time all of the rights represented by the FERC License and various other licenses and permits, including those issued by the State Water Board. Transfer of the FERC License to the Partnership was approved in an order issued by FERC on September 10, 1985. A true and complete copy of the FERC order approving the transfer is designated as Exhibit 11 in the appendix to this stipulation.

7. The Partnership accepted the FERC License and, in July 1985, began construction of the Project. The Project was completed in the spring of 1986.

8. The Project diverts water from Rock Creek at a point located in section 20, township 11 north, range 11 east, Mount Diablo base and meridian. The Project's diversion pond lies upstream from the point of diversion and is located in sections 17 and 20, township 11 north, range 11 east, Mount Diablo base and meridian. After the water is passed through a man-made tunnel, penstocks, and turbines, it is returned to Rock Creek near its confluence with the South Fork American River in section 20, township 11 north, range 11 east, Mount Diablo base and meridian. The 7.5' quadrangle "Garden Valley, Calif." map published by the United States Geological Survey, designated as Exhibit 12 in the appendix to this stipulation, accurately portrays the location of the relevant portions of Rock Creek and the South Fork American River. The portion of Rock Creek between the upper end of the diversion pond and the point at which water is returned

to the creek lies within the following portions of sections 17 and 20, township 11 north, range 11 east, Mount Diablo base and meridian:

a. That portion of the SE ¼ of the SW ¼ of section 17 that is bounded on the north, west and east by the Rock Creek Road;

b. The NE ¼ of the NW ¼ of section 20; and

c. The W ½ of the W ½ of section 20.

9. On October 4, 1985, the Partnership filed with FERC a report of a fishery study it had conducted as required by Article 38 of the FERC License. The California Department of Fish and Game ("California Fish and Game") filed comments with FERC on December 6, 1985. FERC took no immediate action on the fishery study or California Fish and Game's comments on that study.

10. At the request of California Fish and Game, the State Water Board held hearings on the bypass flow issue on May 19, 1986 and September 15, 1986. In briefs, memoranda, and argument submitted to the State Water Board, the Partnership objected that the Board had no jurisdiction to regulate bypass flows in a manner different from that set forth in the FERC License and that the Partnership held sufficient riparian and federal reserved water rights to operate the Project without Board approval. True and complete copies of the following documents filed with the State Water Board in connection with the hearings are designated as exhibits in the appendix to this stipulation:

Exhibit 13: Notice of hearing to be held May 19, 1986, dated March 28, 1986.

Exhibit 14: Petitioner's Notice of Intent to Appear, List of Witnesses, and Statements of Witnesses, dated May 1, 1986.

Exhibit 15: Permittee's Prehearing Memorandum Regarding Federal Preemption, Permittee's Riparian Right to Divert Water, dated May 19, 1986.

Exhibit 16: Permittee's Prehearing Memorandum Regarding the Department of Fish and Game's Burden of Proof and the Order of Proof, dated May 19, 1986.

Exhibit 17: Notice of Reopening and continuation of hearing to be held September 15, 1986, dated August 18, 1986.

Exhibit 18: Permittee's Closing Statement, dated October 27, 1986.

Exhibit 19: Closing Argument/Brief of the Department of Fish and Game, dated October 28, 1986.

Exhibits 20 and 21: Transcripts of hearings on May 19, 1986 and September 15, 1986, Volumes 1 and 2.

11. On July 9, 1986, the Partnership filed with FERC a Petition for a Declaratory Order Confirming Interim Minimum Flows or in the Alternative for a Hearing Establishing Permanent Flows. A true and complete copy of that petition is included as Exhibit 22 in the appendix to this stipulation.

12. On February 6, 1987, the State Water Board staff circulated a Staff Analysis of Record and Draft Order regarding the Project. True and complete copies of that Staff Analysis of Record and Draft Order are included as Exhibits 23 and 24 in the appendix to this stipulation.

13. On February 13, 1987, the Partnership filed with FERC an emergency request for expedited action on the July 1986 petition for declaratory order. On March 11, 1987, FERC issued a declaratory order ("FERC Declaratory Order") clarifying and asserting its exclusive authority over the Project, and ordering the Partnership to continue to comply with the bypass flow requirements set forth in the FERC License until further order from FERC. The FERC Declaratory Order stated that hearings would be held by FERC to determine whether bypass flows should remain at 11 cfs and 15 cfs. True and complete copies of the emergency request and the FERC Declaratory Order are included as Exhibits 25 and 26 in the appendix to this stipulation.

14. The State Water Board unanimously voted to adopt the draft Order as final on March 19, 1987. A true and complete copy of Order WR 87-2 Amending Water Right Permits 19259 and 19260 ("State Order"), as adopted by the State Water Board, is included as Exhibit 27 in the appendix to this stipulation. The State Order is currently in effect and subject to enforcement.

15. On April 9, 1987, the State Water Board filed with FERC a Motion to Intervene in the Rock Creek Limited Partnership FERC Proceeding, No. 3189-014. On the same day, the State Water Board filed with FERC a Request for Rehearing of the FERC Declaratory Order, asserting that FERC abused its discretion and acted in an arbitrary and capricious manner and not in accordance with law in deciding that it had exclusive authority to prescribe bypass flows for the Project, and requesting that FERC amend its order to recognize the State Water Board's authority over the Project. On April 28, 1987,

FERC granted the State Water Board's motion to intervene. On May 8, 1987, FERC issued an Order Granting Rehearing for Purposes of Further Consideration. True and complete copies of the State Water Board's motion to intervene, its memorandum of points and authorities in support of the motion to intervene, its Request for Rehearing, FERC's order granting the State Water Board's motion to intervene, and FERC's Order Granting Rehearing are included as Exhibits 28, 29, 30, 31 and 32 in the appendix to this stipulation.

16. On July 14, 15, and 16, 1987, FERC held hearings on the bypass flow issue. California Fish and Game appeared and presented testimony and other evidence at those hearings. As of the date of this stipulation, no ruling on the merits of the issues involved in that hearing has been rendered.

17. The State Water Board is not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.

18. The Partnership contends that the State Order violates the Supremacy, Due Process, and Takings Clauses of the United States Constitution, 42 U.S.C. § 1983, and Rock Creek's riparian rights under California law. In issuing the State Order, the State Water Board and its members have taken the position that the State Order violates no applicable provision of the United States Constitution, federal law or state law. Accordingly, there exists an actual controversy between the Partnership and the State Water Board and its members as to the character

and extent of the Partnership's right to use the water for the operation of the Project.

19. True and complete copies of portions of the following Annual Reports of the Federal Power Commission are included in the appendix to this stipulation.

Exhibit 33: Cover page and pages 1-63 of First Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1921.

Exhibit 34: Cover page and pages 224-26 of Second Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1922.

Exhibit 35: Cover page and pages 7-9 of Third Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1923.

Exhibit 36: Cover page and pages 7-12 of Fourth Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1924.

Exhibit 37: Cover page and pages 41-42 of Sixth Annual Report of the Federal Power Commission for Fiscal year Ended June 30, 1926.

Exhibit 38: Cover page, pages 2-7, pages 46-47, and page 134 of Seventh Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1927.

Exhibit 39: Cover page and pages 6-9 of Tenth Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1930.

Exhibit 40: Cover page and pages 11-14 of Eleventh Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1931.

Exhibit 41: Cover page and pages 92-94 of Twenty-sixth Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1946.

20. Designated as Exhibit 42 in the appendix to this stipulation are true and complete copies of pages 12-14 and 357-66 of Opinions and Decisions of the Federal Power Commission, Volume 1, January 1, 1931 through June 30, 1939.

DATED: August 21, 1987

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No. 89-333

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S OPENING BRIEF

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60 pp

QUESTION PRESENTED

Whether the Federal Power Act preempts state regulatory water rights laws otherwise applicable to hydropower projects licensed by the Federal Energy Regulatory Commission, or instead whether section 27 of the Act—which subjects such projects to state laws relating to the "control, appropriation, use, or distribution" of water—precludes such preemption.

PARTIES

The petitioner is the State of California, acting on behalf of the State Water Resources Control Board.

The respondents are the Federal Energy Regulatory Commission and the Rock Creek Limited Partnership.

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No. 89-333

In the Supreme Court
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OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITIONER'S OPENING BRIEF

OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. 1-13) is reported at 877 F.2d 743. The pertinent orders of the Federal Energy Regulatory Commission (Pet. App. 14-22, 23-36) are reported at 38 FERC ¶ 61,240 (March 1987) and 41 FERC ¶ 61,198 (November 1987).

JURISDICTION

The decision of the Court of Appeals was entered on June 6, 1989. No petition for rehearing was filed. The petition for writ of certiorari was filed on August 26, 1989. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

Section 27 of the Federal Power Act provides:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.).

STATEMENT OF THE CASE

1. Nature of the Controversy

The Rock Creek Limited Partnership ("partnership") operates a hydropower project on Rock Creek, a tributary of the South Fork of the American River located near Placerville, California. Decision 1596, State Water Resources Control Board (hereinafter "D 1596"), at 2 (J.A. 52). The main feature of the project is a dam located approximately one mile above Rock Creek's confluence with the American River. *Id.* The dam diverts water through a tunnel and penstocks to a powerhouse containing three turbine generators with a capacity of 3,000 kilowatts. *Id.* (J.A. 52- 53). The water is returned to the American River about one mile below the original diversion point. *Id.* The project has the capacity

to generate about 7,000 megawatt-hours of electrical power annually. *Id.* The project is located partially on private lands owned in fee by the partnership and partially on public lands administered by the U.S. Bureau of Land Management. Water Rights Order 87-2, at 11 (J.A. 83).

On June 1, 1982, the partnership's predecessor in interest, Joseph M. Keating, applied to the Federal Energy Regulatory Commission (FERC) for a license to build and operate the Rock Creek project. Order Issuing License, Federal Energy Regulatory Comm'n (hereinafter "License Order"), at 1 (J.A. 13). FERC issued the license on April 29, 1983. *Id.* The license requires the project to maintain minimum flows—that is, to allow certain quantities of water to bypass the dam for the protection of downstream fish resources—of 11 cubic feet per second (cfs) from May through September, and 15 cfs from October through April. *Id.* at 2 (J.A. 15-16). FERC adopted the flow rates recommended by Keating on the basis of his preliminary instream study, and rejected the higher flow rates recommended by the California Department of Fish and Game (CDFG). *Id.* FERC directed Keating to prepare a complete instream study and reserved jurisdiction to modify the flow rates after the study was completed. *Id.*

On March 22, 1980, Keating applied to the State Water Resources Control Board ("State Board") for permits to appropriate water for the project, and on June 4, 1982 filed an amended application. Staff Analysis, Rock Creek Hydroelectric Project, at 2 (J.A. 72). After lengthy hearings, the State Board on February 16, 1984, issued a water rights decision approving issuance of the permits. D 1596, at 1 (J.A. 51). The State Board adopted on an interim basis Keating's recommended flow rates, but found that his instream study was "deficient" because it failed to consider most habitat types and stream areas affected by the project. *Id.* at 8-9 (J.A. 59-60). Accordingly, the State Board required Keating, in consultation with CDFG, to prepare a new instream study before commencing construction or diverting water. *Id.* at 9 (J.A. 60). The State Board found that "Rock Creek is important because it provides fishery recruitment to the South Fork American River and because it directly provides adult trout for angler

harvest." *Id.* at 8 (J.A. 58). The State Board reserved jurisdiction to establish permanent flow rates after the instream study was completed. *Id.* at 15 (J.A. 66).[1]

After completion of the instream study, the State Board conducted a hearing to establish permanent flow rates for the project, which Keating in the meantime had sold to the partnership. After the hearing was concluded, the State Board on March 19, 1987, adopted permanent flow rates of 60 cfs from March through June and 30 cfs from July through February. Water Rights Order 87-2, at 48 (J.A. 124). These flow rates were consistent with the rates recommended by CDFG, and were substantially higher than the rates recommended by the partnership and contained in the FERC license. *Id.* The State Board found that the partnership's recommended rates "would greatly reduce the fishery habitat in Rock Creek" and that CDFG's recommended rates "would better protect the adult, juvenile and spawning habitats." *Id.* at 42, 43 (J.A. 118, 119).

2. Proceedings Below

On July 9, 1986, during the pendency of the State Board hearing to establish permanent flow rates, the partnership petitioned FERC for an order declaring that FERC has exclusive jurisdiction to establish flow rates and that the project need not comply with flow rates mandated by the State Board. Order in Response to Request for Declaratory Order (hereinafter "Declar-

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[1] The State Board granted the permits notwithstanding the "deficiency" of Keating's preliminary instream study so that Keating would not have to submit new applications after the final study was completed. Water Rights Order 87-2, at 19 (J.A. 91). The State Board believed that the issuance of the permits based on the preliminary study was appropriate because the permits specifically required Keating to obtain permanent flow requirements prior to diverting water. D 1596, at 9 (J.A. 60).

In determining whether unappropriated water was available for the project, the State Board determined that the partnership's appropriation rights are lower in priority than, and therefore are subject to, future upstream appropriations for domestic and stockwatering uses. D 1596, at 7, 13 (J.A. 58, 65).

atory Order"), at 3 (Pet. App. 16). On March 11, 1987, shortly before the State Board issued its decision, FERC issued a declaratory order stating that "the establishment of minimum flows is a matter beyond the reach of state regulation;" that the State Board "has no authority to set minimum flows for the project that conflict with those contained in the license;" and that the project "must comply with the flow requirements" of the license "irrespective of any action taken by" the State Board. *Id.* at 4-5 (Pet. App. 17-18).

On April 10, 1987, the State of California filed a motion to intervene in the FERC proceeding and a petition for rehearing. Order Denying Rehearing, at 1-2 (Pet. App. 24). In its rehearing request, California argued that section 27 of the Federal Power Act authorizes the State Board to establish minimum flow rates for the project. *Id.* at 3 (Pet. App. 25-26). FERC granted the intervention motion but denied the rehearing request, reaffirming its view that FERC has exclusive jurisdiction to establish flow rates. *Id.* at 2-3 (Pet. App. 24-25). Under 16 U.S.C. § 825l, California filed a petition in the Court of Appeals for review of FERC's declaratory order and order denying rehearing. Pet. App. 4.

On June 6, 1989, the Ninth Circuit affirmed FERC's declaratory order and order denying rehearing. Pet. App. 1-13. The court held that the Federal Power Act preempts state regulation of hydropower projects, and therefore that FERC has exclusive jurisdiction to establish flow rates for the Rock Creek project and that the State Board lacks jurisdiction to establish such rates. *Id.* The court rejected California's argument that section 27 of the Federal Power Act authorizes state regulation of hydropower projects, holding that section 27 merely protects private "proprietary rights" in water. *Id.* at 11. California filed a petition for writ of certiorari, which was granted on December 4, 1989.

SUMMARY OF ARGUMENT

I

Section 27 of the Federal Power Act (FPA) provides that hydropower projects licensed by the Federal Energy Regulatory Commission (FERC) must comply with state laws relating to

"control, appropriation, use, or distribution" of water. On its face, the provision requires hydropower projects to acquire water rights under state law and to comply with conditions attached to such rights. In effect, the provision authorizes the states to exercise concurrent jurisdiction over federally-licensed hydropower projects. California's flow requirements in this case relate to "control, appropriation, use, or distribution" of water and thus fall within the scope of section 27.

Section 27 was modeled after section 8 of the Reclamation Act of 1902, which provides that federal reclamation projects must comply with state laws relating to "control, appropriation, use, or distribution" of water. In *California v. United States,* 438 U.S. 645 (1978), this Court held that section 8 requires federal reclamation projects to acquire water rights under state law and to comply with conditions attached to such rights. Since section 27 was modeled after section 8, section 27 imposes the same obligations on private hydropower projects. If Congress intends that state water laws apply to *federal* reclamation projects authorized and funded by Congress that serve important national purposes, *a fortiori,* Congress intends that state water laws apply to *private* hydropower projects operated for profit that serve essentially local purposes. In *California*, this Court held that section 8 does not authorize the application of state laws that conflict with "clear congressional directives." California's flow requirements in this case do not conflict with "clear congressional directives" and thus are valid under section 27.

II

Congress' traditional deference to state water rights laws supports the conclusion that Congress deferred to state law in enacting section 27. The policy of deference to state law originated in the equal footing doctrine, and has been carried forth in congressional statutes that "sever" water from public lands belonging to the federal government. As a result of the policy of deference, water rights in our federal system are controlled and regulated by the states, not the federal government. Accordingly, the states have total control of their internal waters, subject to federal constitutional limitations not applicable here, It is unlikely that Congress intended to abruptly change its tradi-

tional policy in enacting the FPA. Section 27 indicates that no such change was intended.

III

The legislative history of the FPA indicates that Congress intended to require federally-licensed hydropower projects to fully comply with state water laws. Indeed, the legislative history indicates that section 27 of the FPA was modeled after section 8 of the 1902 Reclamation Act, which, as this Court held in *California v. United States,* requires federal reclamation projects to comply with state water laws. According to the legislative history, Congress—believing that the states "owned" the water and the federal government owned the public lands—intended to create a federal program that would make public lands available for hydropower development without diminishing state water rights authority.

IV

In *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n,* 328 U.S. 152 (1946), this Court stated in dictum that section 27 is limited to "proprietary rights" in water and does not authorize state regulation of hydropower water uses. In *California v. United States,* this Court specifically rejected the argument that section 8 of the 1902 Reclamation Act is limited to "proprietary rights," holding that section 8 authorizes state regulation of federal water uses. Since section 27 was modeled after section 8, the *First Iowa* dictum that section 27 is limited to "proprietary rights" is invalid after *California.* Indeed, the *First Iowa* dictum was specifically based on the premise that section 8 of the 1902 Reclamation Act is limited to "proprietary rights," and *California* flatly rejected this premise. Additionally, the *First Iowa* dictum is inconsistent with the legislative history of the FPA, which indicates that Congress specifically intended to require hydropower projects to comply with state water laws.

The actual holding in *First Iowa* is distinguishable here because *First Iowa* held only that section 9(b) of the FPA does not require hydropower projects to acquire state permits as a "condition precedent" to acquiring FERC licenses. 328 U.S. at 170, 175.

This holding is inapposite here because the Rock Creek project has already acquired a FERC license and California does not challenge the issuance of the license. The question here is whether section 27 requires hydropower projects independently to comply with state water laws irrespective of any rights and obligations under a FERC license, a question that was not raised or definitively resolved in *First Iowa.*

V

FERC's assertion of exclusive jurisdiction over hydropower projects would result in potentially inconsistent regulation of water rights in the same river and create confusion in the administration and coordination of water rights. Under FERC's argument, state water laws would apply to all water users in a particular river—including, after *California,* the United States itself—except for private hydropower projects. Because of the interdependency of water rights, the states cannot effectively administer and coordinate water rights unless state laws apply to all users, including hydropower projects. In enacting section 27, Congress recognized that the states have legitimate interests in balancing hydropower needs against other needs dependent on the states' limited water supplies.

VI

There is no conflict between state and federal regulation of the Rock Creek project here. California has granted rather than denied a water right permit for the project. Moreover, California has adopted more stringent flow requirements than FERC; hence, the project, in complying with California's requirements, will necessarily comply with FERC's requirements as well. California's flow requirements do not frustrate the purpose of the FERC requirements, but instead provide more protection of the fish resources that are the subject of the FERC requirements.

ARGUMENT

I. SECTION 27 OF THE FEDERAL POWER ACT—CONSTRUED FACIALLY AND IN LIGHT OF THIS COURT'S DECISION IN *CALIFORNIA V. UNITED STATES*—PROVIDES THAT STATE WATER LAWS APPLY TO HYDROPOWER PROJECTS[2]

A. Facial Construction of Section 27

In 1920, Congress passed the Federal Water Power Act, 41 Stat. 1063 (1920), which was subsequently incorporated in the Federal Power Act of 1935 (FPA), 16 U.S.C. §§ 791(a)-793, 795-818, 820-820r. The FPA created a federal agency—the Federal Power Commission, subsequently renamed the Federal Energy Regulatory Commission (FERC)—to regulate hydropower development. Section 1, 16 U.S.C. § 792. Under section 4(e), FERC is authorized to license the construction and operation of individual hydropower projects. 16 U.S.C. § 797(e). Under section 10(a), FERC must ensure that the licenses are consistent with a comprehensive plan for water development. 16 U.S.C. § 803(a).[3]

[2] The preemption issue raised here has its greatest impact in the three Pacific Coast states of California, Washington and Oregon because approximately one-half of the nation's total hydropower capacity exists in those three states. See FERC, "Water Power—Use of A Renewable Resource," at 6 (May 1988). The preemption issue has not previously arisen in California because hydropower projects have consistently complied with California's water rights laws. According to the State Board's information, 492 non-federal hydropower projects in California have acquired or have applied for water rights under California law, and, until the instant case, no hydropower project has diverted water without acquiring or claiming a water right under California law. Pet. 7 n. 1.

[3] To briefly summarize the events that led to enactment of the FPA, the Dam Act of 1906, 34 Stat. 386, prohibited construction of dams in navigable waters without approval of Congress and the Secretary of War. Pursuant to this Act, Congress and the Secretary routinely approved construction of individual hydropower projects. Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 HARV. ENV. L. REV. 135, 147-149 (1986). In 1908, President Theodore Roosevelt vetoed several congressional bills authorizing hydropower projects, stating that he would approve no further projects until Congress developed a comprehensive plan for development. *Id.* at 147-149. As a result of President Roosevelt's opposition, hydropower development ground to a halt. *Id.* From 1914 to 1920, Congress considered several bills designed to regulate hydropower development, finally enacting the FPA in 1920. See pages 23-35, *infra*. As will be explained, the legislative history indicates that Congress intended to remove federal obstacles that impeded hydropower development, and also intended to preserve the states' traditional water rights authority over the projects. *Id.*

The FPA contains two provisions that preserve the states' traditional water rights authority over hydropower projects. Section 9(b) requires an applicant for a FERC license, as part of the application, to submit "satisfactory evidence that the applicant has complied with the requirements of" state law. 16 U.S.C. § 802(b). Section 27 provides that the FPA does not preempt state laws relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821; see page 1, *supra*. Thus, section 9(b) requires the project operator to submit evidence of compliance with state law in applying for a FERC license, and section 27 requires the project independently to comply with state water laws irrespective of its rights and obligations under the FERC license. In short, section 9(b) describes the operator's evidentiary burden in the FERC licensing process, and section 27 describes the project's independent obligation to comply with state law outside the FERC licensing process.

In this case, the Rock Creek project has already acquired a FERC license and California does not challenge the issuance of the license. Rather, California contends that the project must independently comply with state flow requirements irrespective of its rights and obligations under the FERC license. Thus, this case is governed by section 27, not section 9(b). The question is the nature of the project's obligation to comply with state law outside the FERC licensing process, not the nature of the operator's evidentiary burden in the FERC licensing process.

On its face, section 27 plainly requires hydropower projects to comply with state water laws irrespective of any rights and obligations under a FERC license. The provision states that the FPA does not preempt state laws relating to "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses . . . ." California's flow requirements here relate to the "control, appropriation, use, or distribution" of water for "other uses," specifically instream uses and hydropower uses. Indeed, in *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954), this Court specifically held that the reference to "other uses" includes hydropower uses, rejecting the contrary implication in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946). Thus, section 27 requires the Rock Creek project to comply with California's flow requirements. The project's obligation to comply with California's flow requirements is independent of, and therefore neither displaces nor is displaced by, the project's obligation to comply with FERC's lesser flow requirements.

The Ninth Circuit held that the reference in section 27 to "irrigation," "municipal" and "other uses" implies that the provision is limited to "property rights," and concluded that section 27 defers only to state *property* laws—*i.e.*, state laws defining and recognizing private water rights—but not to state *regulatory* laws. Pet. App. 8-9. If Congress had intended to limit section 27 to property rights, it would have been sufficient to simply disclaim any intent to interfere with vested rights. Instead, Congress expressly deferred to state laws relating to "control, appropriation, use, or distribution of water . . . *or* any vested right acquired therein." (Emphasis added.) The disjunctive reference indicates that state laws relating to "control, appropriation, use, or distribution" of water are greater than, and not limited to, state laws relating to "vested rights." Thus, section 27 facially includes not only state property laws, but also other state laws as well. The Ninth Circuit, by construing section 27 as limited to "property rights," rendered the first clause in section 27 a nullity.[4]

[4] Moreover, in *California v. United States*, 438 U.S. 645 (1978), this Court specifically rejected the same "property rights" argument in construing section 8 of the Reclamation Act of 1902, which was the progenitor of section 27. Section 8 requires federal reclamation projects to comply with state laws relating to "control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383. In *California*, the United States argued that the reference to "irrigation" uses in section 8 implies that the provision is limited to "property rights" and therefore that the provision does not authorize state regulation of water. Brief for United States, *California v. United States*, at 36, 126-129, No. 77-285, Oct. Term 1977. This Court rejected the United States' argument, holding that section 8 authorizes state *regulation* of water uses and therefore is not limited to "property rights" in water. *California*, 438 U.S. at 665, 667; see also *United States v. California*, 694 F.2d 1171 (9th Cir. 1982) (Kennedy, J.) (on remand of *California*, state regulatory water laws held to apply to all uses of multi-purpose federal water project, including hydropower uses). Since this Court rejected the "property rights" argument in construing section 8, this Court should similarly reject the same "property rights" argument in construing section 27, since the latter provision was modeled after the former.

Under conventional preemption analysis, federal law preempts state law if (1) Congress has "occupied the field" that is the subject of state regulation, or (2) state law "conflicts" with federal law, or otherwise stands as an "obstacle" to the congressional purpose. *E.g., California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Section 27 is an anti-preemption provision in that it specifically limits the preemptive effect of the FPA. In cases involving an anti-preemption provision, it is improper to apply conventional preemption analysis to determine whether Congress has "occupied the field" or whether state law "conflicts" with federal law, because Congress has directly addressed these questions by adopting the anti-preemption provision. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 482 n. 8 (2d ed. 1988).[5] The proper inquiry in such cases is to determine

[5] According to Professor Tribe:

> "The governing statute may . . . restrict its own preemptive effect . . . . When this is the case, it seems quite improper for a court even to *ask* whether a challenged state law . . . 'conflicts' in some more nebulous sense with the federal statute or its objectives. To engage in such a broader inquiry is to forget that preemption is ultimately a matter of *construing* a federal statute; when the statute contains its

the meaning of the anti-preemption provision itself. See, *e.g.*, *California v. United States*, 438 U.S. 645 (1978) (interpreting section 8 of Reclamation Act of 1902); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629-633 (1981) (interpreting section 32 of Mineral Lands Leasing Act); *California Fed. Savings & Loan Ass'n v. Guerra*, ____ U.S. ____, 107 S.Ct. 683, 697 (1987) (Scalia, J., concurring). As Professor Tribe has noted, the preemption issue ultimately turns on the congressional intent, and the congressional intent is manifested in the anti-preemption provision. See note 5, *supra*. Since section 27 specifically precludes preemption of state laws, the provision makes clear that state water laws play a significant role in the federal regulatory scheme.

B. *California v. United States:* Section 8 of Reclamation Act of 1902

Section 27 of the FPA was modeled after section 8 of the Reclamation Act of 1902, which provides that the Secretary of the Interior, in operating federal reclamation projects, must comply with state laws relating to the "control, appropriation, use, or distribution used in irrigation, or any vested right acquired thereunder." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383; see note 4, *supra*. As shall be explained, the legislative history of the FPA indicates that Congress specifically followed the precedent of section 8 in enacting section 27. See pages 22-35, *infra*. The Ninth Circuit below acknowledged that sections 8 and 27 contain "virtually identical" language and that section 8 "apparently served as the drafting model for section 27." Pet. App. 9, 10.

In *California v. United States*, 438 U.S. 645 (1978), this Court held that section 8 requires the Secretary of the Interior to comply with state regulatory water rights laws. There, the State

own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path." TRIBE, AMERICAN CONSTITUTIONAL LAW, at 482 n. 8 (emphasis in original); see also *id.* at 510-511.

Board issued permits authorizing the Secretary to appropriate water for the New Melones Project. The permits contained several major conditions, some of which required water releases for protection of fish. 438 U.S. at 652 n. 8. This Court, reversing the Ninth Circuit, upheld the State Board's authority to impose the conditions. The Court held that section 8 requires the Secretary to acquire water rights under state law and to comply with conditions attached to the rights. *Id.* at 665, 667. According to the Court, the Secretary must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law," and must comply with state law in "providing distribution to individual landowners" once the water is released from the dam. *Id.* The only limitation, the Court stated, is that state laws cannot be applied if they conflict with "clear congressional directives," because Congress can adopt specific substantive goals or policies that limit state authority under section 8. *Id.* at 672, & n.25.[6]

The *California* Court emphasized that Congress has traditionally deferred to state water rights laws, stating that:

> "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the *consistent thread of purposeful and continued deference to state water law by Congress.*" *Id.* at 653 (emphasis added).

The Court stated that a "principal motivating factor behind Congress' decision to defer to state law was . . . the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *Id.* at 668-669. The Court rejected the United States' argument that section 8 is limited to "proprietary rights" in water, stating that Congress "intended to defer to the substance, as well as the form, of state

[6] The Court remanded the case for determination of whether the State Board's conditions were inconsistent with "clear congressional directives." 438 U.S. at 679. On remand, the Ninth Circuit, in a decision authored by then-Judge Kennedy, held that none of the conditions were inconsistent with congressional directives and thus that all were valid. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

water law," and that the United States' argument would "trivialize the broad language and purpose of § 8." *Id.* at 675.[7]

Since *California* holds that section 8 requires federal reclamation projects to comply with state regulatory water laws, and since section 27 was modeled after section 8, section 27 similarly requires hydropower projects to comply with such state laws. In particular, since section 8 authorizes the states to impose conditions on federal water uses—including conditions requiring protection of fish—section 27 authorizes the states to impose similar conditions on hydropower uses. In short, section 27 imposes on private hydropower projects the same obligation to comply with state law that section 8 imposes on federal reclamation projects. The only limitation is that under section 27, as under section 8, state laws cannot be applied if they conflict with "clear congressional directives," for Congress can adopt specific substantive

[7] The decision in *California* has been followed and applied by this Court and other courts and thus has become part of the fabric of the federal reclamation laws. See *Nevada v. United States*, 463 U.S. 110, 122 (1983) (state water laws apply to federal Newlands Project in Nevada); *United States v. California*, 694 F.2d 1171 (9th Cir. 1982) (conditions imposed by State Board on federal New Melones Project are not inconsistent with "clear congressional directives" and are valid); *South Delta Water Agency v. United States*, 767 F.2d 531 (9th Cir. 1985) (state water laws apply to federal Central Valley Project and hence United States has waived sovereign immunity under Administrative Procedures Act); *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986) (conditions imposed by State Board on federal Central Valley Project for protection of Delta water quality needs are not inconsistent with "congressional directives" and hence are valid); *United States v. Alpine Land & Reservoir Co., et al.*, 697 F.2d 851, 854-855, 858 (9th Cir. 1983) (state law determines beneficial uses of federal Newlands Project); *United States v. 71.22 Acres of Land*, 665 F.Supp. 885 (D. Utah 1987) (state law applies to United States' condemnation of water rights).

Additionally, Congress has codified the *California* decision by requiring the Secretary of the Interior, in operating the Central Valley Project in California, to comply with State Board conditions relating to Delta water quality to the extent that such conditions are consistent with "congressional directives." 100 Stat. 3050, 3051 (1986).

goals or policies that limit state authority under section 27. Cf. *California*, 438 U.S. at 672, & n. 25. California's flow requirements in this case do not conflict with clear congressional directives, nor does FERC argue otherwise. Rather, FERC argues that Congress has authorized FERC to exercise *exclusive* jurisdiction over hydropower projects, an argument that, in *California's* phrase, would "trivialize the broad language and purpose" of section 27. 438 U.S. at 675.[8]

FERC's exclusive jurisdiction argument would anomalously exempt private hydropower projects from state laws that apply to federal reclamation projects, notwithstanding that both projects are governed by virtually identical anti-preemption provisions. Under FERC's argument, for example, California law would apply to the federal New Melones Project on the Stanislaus River —as this Court squarely held in *California*—but not to a private hydropower project located directly above or below the federal project in the same river. This result would create the "legal confusion" that, as this Court stated in *California*, "would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 668-669. Congress, by following the precedent of section 8 in enacting section 27, clearly intended no such anomaly.

[8] In its opposition to the petition for writ of certiorari, FERC argued that its preemption view is supported by the Electric Consumers Protection Act (ECPA), 100 Stat. 1243 (1986), which requires FERC to consider fish needs and to consider recommendations of federal and state fish and wildlife authorities. 16 U.S.C. §§ 797(e), 803(j)(1); see FERC Opp. Br. 20-21. ECPA, however, directs only that *FERC* consider certain fish needs and recommendations, and does not preclude the *states* from considering similar needs or recommendations. Hence, ECPA contains no "congressional directive," "clear" or otherwise, precluding the application of state flow requirements here. Moreover, ECPA specifically disclaims any intent to "alter or establish the respective rights of States, the United States, . . . or any person with respect to any water or water related right . . . ," 100 Stat. 1259, thus making clear that ECPA does not diminish state water rights authority under section 27.

Indeed, there is a stronger basis for applying state law in the hydropower context here than in the reclamation context in *California*. Federal reclamation projects are authorized and funded by Congress, and are built and operated by federal agencies for public purposes. Private hydropower projects, on the other hand, are built and operated by private entities for profit purposes, and are *not* authorized or funded by Congress. Moreover, federal reclamation projects serve important national goals, and private hydropower projects serve more local goals. As the Ninth Circuit has stated:

> "[T]he position of a licensee [under the FPA] is distinguishable from that of the United States with respect to furthering the national interest. By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the national interest on a national scale; the licensee often acts on a local scale, on projects thought to be of insufficient dimension to warrant the exercise of national power." *Public Utility Dist. No. 1 v. Seattle*, 382 F.2d 666, 669-670 (9th Cir. 1967).

Indeed, the federal New Melones Project involved in *California* stored 2.4 *million* acre-feet of water for agricultural, domestic, hydropower, instream and other uses, *California*, 438 U.S. at 645, and the Rock Creek project involved here stores only 2.7 acre-feet of water solely for hydropower uses. License Order, at 2 (J.A. 14). Most importantly, this Court has applied a stricter standard in determining whether Congress has waived sovereign immunity to authorize state regulation of federal facilities, than in determining whether state laws apply to private activities notwithstanding preemption claims. Compare *Hancock v. Train*, 426 U.S. 167, 179 (1976) (federal facilities), with *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (private activities). If Congress intends to defer to state laws applicable to congressionally-authorized *federal* projects that serve important national purposes, *a fortiori*, Congress intends to defer to state laws applicable to profit-oriented *private* projects that serve essentially local purposes.

In the proceedings below, FERC argued that *California* is distinguishable because FERC has "comprehensive" authority to "regulate" hydropower development and the Secretary of the Interior—who administers the federal reclamation program involved in *California*—lacks comprehensive authority and exercises primarily an operational function. Congress, however, has adopted the same anti-preemption provision for both programs, thus making clear that state laws apply to both programs regardless of their differences. Moreover, the similarities of the programs are stronger than their differences in any event. Both programs provide for federal *development* of water for specified economic purposes, and both create federal agencies that are responsible for providing such development. Although the agencies' functions are different in some respects, Congress has narrowed the differences by providing for extensive regulation of federal reclamation projects, both in the original 1902 act and in supplementary reclamation statutes.[9] The Secretary of the Interior has narrowed the differences further by operating the projects in conformity with engineering and feasibility reports that provide *de facto* regulation of the projects. See, *e.g.*, H.R. Doc. No. 453, 87th Cong., 2d Sess. (1962) (feasibility report for New Melones Project). Also, both programs provide for development of a resource—water—that the states have traditionally regulated and controlled. Because of the similarities of the programs, particularly with respect to their anti-preemption provisions, there is no basis for construing their preemptive effects differently.

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[9] The original 1902 Reclamation Act established acreage limitations, construction charges, repayment obligations, contract terms, and beneficial use requirements. 32 Stat. 388-390 (1902), 43 U.S.C. § 371 *et seq.* Amendatory reclamation statutes authorize operation of reclamation projects for multiple purposes, provide for reimbursement and non-reimbursement of certain project functions, and modify the original acreage limitations. See, *e.g.*, Reclamation Project Act of 1939, 43 U.S.C. § 485h; Reclamation Reform Act of 1982, 96 Stat. 1263. Recent federal environmental statutes also apply to and constrain the operation of federal reclamation projects. See, *e.g.*, National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.*; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c; Endangered Species Act, 16 U.S.C. § 1521; Clean Water Act, 33 U.S.C. § 1251 *et seq.*

II. CONGRESS' TRADITIONAL DEFERENCE TO STATE WATER LAWS SUPPORTS THE CONCLUSION THAT CONGRESS DEFERRED TO STATE LAWS IN ENACTING SECTION 27

Congress' historic policy of deference to state water law strengthens the conclusion that Congress intended to defer to state water laws under the FPA. As this Court noted in *California*, Congress traditionally has followed a policy of "purposeful and continued deference to state water law." 438 U.S. at 653. The congressional policy of deference underlies section 8 of the 1902 Reclamation Act, *id.*, which was the progenitor of section 27. In effect, Congress has recognized that the states have primary responsibility for regulating water rights in our federal system. Congress presumptively does not intend to preempt state laws in areas traditionally regulated by the states unless Congress clearly manifests its intent. See, *e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377 (1983). As this Court recently stated:

> "When Congress legislates in a field *traditionally occupied* by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress.*" *California v. ARC America Corp., et al.*, ____ U.S. ____, 109 S.Ct. 1661, 1665 (1989), quoting from *Rice*, 331 U.S. at 230 (emphasis added).

Section 27, far from reflecting a "clear and manifest purpose" to preempt state water laws, expressly defers to such state laws. The historical force and pervasiveness of Congress' policy of deference to state water law strengthens the conclusion that this policy underlies section 27.

1. The Equal Footing Doctrine

The policy of deference to state water law originated in the equal footing doctrine, which rests on a constitutional foundation. *California*, 438 U.S. at 654-655. Under this doctrine, the western states whose domain is largely owned by the federal government acquire the same sovereign interests in navigable waters that were

retained by the original states; hence, the western states possess sovereign right, title and interest to all navigable waters within their borders, subject to Congress' power to regulate commerce and navigation. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively v. Bowlby*, 152 U.S. 1, 14-15, 16, 49-50 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224-229 (1845); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The states' sovereign interests are "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference with private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The states' sovereign interests include not only proprietary *ownership* of beds and banks of navigable waters, but also the right to *regulate* allocation and use of water itself. *California*, 438 U.S. at 654-655, 663; *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907). Most western states have codified these principles of sovereignty, providing that water is the "property" of the people or that water use is a "public use" subject to state regulation and control. See, *e.g.*, Cal. Water Code § 102 ("property"); COLO. CONST., Art. XVI, § 5 (same); MONT. CONST., Art. III, § 5 ("public use"); CAL. CONST., Art. X, § 5 (same).

The states' sovereign interests in navigable waters include the right to regulate and conserve fish resources for the benefit of the whole community. *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876); *Manchester v. Massachusetts*, 139 U.S. 240, 259-260 (1891); *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). In *McCready*, this Court stated that:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. [Citations omitted.] *In like manner, the States own the tide-waters themselves, and the fish in them*, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. [Citation omitted.] The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted

> to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State*, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstruction of navigation." 94 U.S. at 395 (emphasis added).

See also *People v. Truckee Lumber Co.*, 116 Cal. 397, 399-400 (1897); *People v. California Fish Co.*, 166 Cal. 576, 584-585 (1913). In this case, California adopted its flow requirements in order to conserve a fish resource that belongs to all the people of California. Although the states' sovereign authority to regulate fish is not without limitation,[10] such sovereign authority is entitled to deference in construing a congressional statute that preserves state water rights authority.

2. The Severance Principle

In the nineteenth century, Congress enacted several public lands and mining statutes that "severed" the water from the public lands, thus lending congressional imprimatur to the constitutional principle that the states have sovereign interests in their internal waters. In the Mining Acts of 1866 and 1870, 14 Stat. 251 (1866), as amended, 16 Stat. 217 (1870), 43 U.S.C. § 661, Congress protected water rights recognized under state and local law from claims of the United States and its patentees. In the Desert Land Act of 1877, 19 Stat. 377 (1877), 43 U.S.C. §§ 321-

[10] The Commerce Clause of the U.S. Constitution, Art. I, § 8, Cl. 2, prohibits the states from imposing unreasonable burdens on interstate commerce, and the Privileges and Immunities Clause, Art. IV, § 2, Cl. 1, prohibits the states from discriminating against citizens of other states. This Court has held that these constitutional provisions restrict the states' sovereign proprietary interests in fish and game resources. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (Commerce Clause); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 384-385 (1978) (Privileges and Immunities Clause); *Toomer v. Witsell*, 334 U.S. 385 (1948) (same). These constitutional limitations do not apply here because the State Board's flow requirements do not burden interstate commerce or discriminate against citizens of other states.

323, Congress provided that unappropriated water "shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes. . . ." In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), this Court held that these statutes "effected a *severance* of all waters upon the public domain, not theretofore appropriated, from the land itself." 295 U.S. at 162 (emphasis added). Under the severance principle, water rights in our federal system are controlled by state law, not federal law. *California Oregon Power*, 295 U.S. at 158-165; *California v. United States*, 438 U.S. at 657-658; *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *Nevada v. United States*, 463 U.S. 110, 123-124 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937). Indeed, Congress has continued its policy of deference in recent enactments. For example, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, provides that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by" the Act. 33 U.S.C. § 1251(g). Thus, Congress has traditionally deferred to state water rights laws, rather than adopting a uniform national law. It is improbable that Congress meant to abruptly change its policy in enacting the FPA. In enacting section 27, Congress plainly indicated that no change was intended.[11]

An eloquent expression of Congress' deference to state water law is found in the Senate report relating to the McCarran Amendment, 43 U.S.C. § 666(a), which provides for state court jurisdiction over federal water claims. This report, as quoted in *California*, stated that:

[11] In *New Mexico*, this Court cited a 1964 Senate report that, in the Court's words, listed "37 statutes in which Congress has expressly recognized the importance of deferring to state water law," commencing with the Mining Acts of 1866 and 1870. Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation, Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 302-310 (1964) (hereinafter "S. 1275 Rep."), cited in *New Mexico*, 438 U.S. at 702, & n. 5. One of the statutes listed in the Senate report is section 27 of the FPA. S. 1275 Rep., at 306.

> "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof. . . . [¶] Since it is clear that the States have the control of water within their boundaries, *it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.*" S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951), quoted in *California,* 438 U.S. at 678-679 (emphasis added).

Notwithstanding Congress' traditional deference to state water laws, Congress retains paramount constitutional authority to regulate navigation and to reserve water for use on federal lands. See, *e.g., United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913) (federal navigation power); *United States v. New Mexico,* 438 U.S. 696, 702 (1978) (federal reserved rights). FERC does not assert authority under the federal navigation power or the reserved rights doctrine in this case, and therefore neither limitation applies here. The question here is the extent to which Congress has statutorily deferred to state water law, not the scope of Congress' constitutional power to regulate water use. As this Court has noted, " '[E]xcept where the reserved rights or navigation servitude of the United States are involved, the State has total control over its internal waters.' " *California,* 438 U.S. at 662, quoting from *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703 (1899). Since these federal limitations do not apply in this case, California has "total control" of its internal waters here.

III. THE LEGISLATIVE HISTORY OF SECTION 27 INDICATES THAT CONGRESS INTENDED TO DEFER TO STATE REGULATORY WATER LAWS

The legislative history of the FPA provide the strongest indication that Congress intended to defer to state water rights laws. Congress debated the subject of hydropower legislation from 1914 until the FPA was enacted in 1920. As shall be seen, two

overarching themes dominated these debates. First, Congress intended to promote hydropower development by concentrating all *federal* licensing authority in a single agency, rather than continue to have such authority dispersed among several federal agencies. Second, and more importantly here, Congress intended to preserve the states' traditional water rights authority over hydropower projects, thus continuing and extending its policy of deference to state law. Indeed, the legislative history indicates that Congress, in enacting section 27, specifically followed the precedent of section 8 of the 1902 Reclamation Act, which requires the Secretary of the Interior to comply with state water laws. In Congress' mind, the federal government owned the public lands and the states owned the water, and Congress wanted to make federal lands available for hydropower development without diminishing state water rights authority over the projects. Thus, Congress intended to develop a federal program in conformity with rather than in derogation of state water laws.

A. H.R. 16673 (63rd Congress)

The language of section 27 first appeared in section 14 of H.R. 16673, a hydropower bill introduced in 1914.[12] Congressman Mondell of Wyoming, the principal author of section 8 of the 1902 Reclamation Act, stated that section 14 recognized state primacy over water rights regulation, declaring that:

> "Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public land States is a right received from the people of the States and not from the Federal Government. The people of the Commonwealths of the West are the owners and proprietors of all the waters within their borders, and the only right that any individual can have or secure, at least in the majority of

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[12] Section 14 provided:
"That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder." H.R. Rep. No. 842, 63d Cong., 2d Sess. 4 (1914).

the public-land States, is the right to use the water at a certain designated place for a specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. *The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water* or to use a drop of water for the turning of any wheel or turbine. *That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people through the authorities they have provided in the States.*" 51 Cong. Rec. 13630 (1914) (remarks of Rep. Mondell) (emphasis added).

Congressman Mondell stated that section 14 continued the policy of deference to state water law established in section 8 of the 1902 Reclamation Act, declaring that:

> "[T]here is nothing in the law that any way conflicts or comes in contact with *the right of a State to say who shall use the water and how it shall be used*. . . . It [section 14] is somewhat similar to the provision contained in the reclamation law. . . ." *Id.* at 13631 (emphasis added).

Congressman Taylor of Colorado, who authored section 14, declared that the provision was patterned after section 8, stating that:

> "[T]he thought before the committee was . . . for the express protection of the States; and inasmuch as it went as far and in language *substantially the same as section 8 of the reclamation law*, we thought that the courts would construe that it was the intention of Congress to protect our rights." *Id.* (remarks of Rep. Taylor) (emphasis added).

More pointedly, Congressman Taylor stated that:

> "*I took this language of section 14 from section 8 of the reclamation bill and inserted it in this bill.*" *Id.* at 14067 (emphasis added).

Congressman Taylor stated that section 14, as well as section 8, followed the precedent of the Mining Acts of 1866 and 1870, *id.*,

which as noted earlier provided the basis of the severance principle enunciated in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). See pages 20-21, *supra*. Congressman Taylor also noted that section 14 followed the principle enunciated in *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907), which holds that the states have "proprietary" ownership of navigable water under the equal footing doctrine. 51 Cong. Rec. 14067-14068 (1914); see page 19, *supra*.

Congressman Raker of California reaffirmed that section 14 continued the policy established in section 8, stating that:

> "*[S]ection 14 of this act does what is done in the original reclamation act. . . .* [¶] *It is generally conceded by all that the water belongs to the States.* The National Government is not dealing in this bill with water or water rights that it does not control; and when Congress passed the reclamation law it put in this provision, so as to make it plain and clear that the National Government was not attempting or intending in any way to legislate upon water rights over which it did not pretend to have any control. . . . [¶] *[T]his bill does not intend to legislate in regard to water rights.*" 51 Cong. Rec. 14070 (1914) (emphasis added) (remarks of Rep. Raker).

A colloquy between Congressman Raker and Congressman Stevens of New Hampshire made clear the primacy of state water law:

> "Mr. STEVENS: Suppose the State of Colorado has laws governing the use of water for the development of power, which laws vary materially from the rules and regulations set out in this act. Which would govern, the State law or this law?
>
> "Mr. RAKER: . . . [T]he State law in regard to water rights, in regard to acquisition, and in regard to use, ought to remain in the State, where it now is. And if there is any possibility of the Government having any control of it, it ought not to have any, because it is practically recognized by all that the water right and its control is a State function, the property of the State. *You get your water right from the State.*

"Mr. STEVENS: . . . *You answer that question, then, by saying that the State law would control?*

"Mr. RAKER: *Yes.*" *Id.* at 14070-14071 (emphasis added).

Congressman Taylor supported Congressman Raker's interpretation of section 14, stating that:

> "A power company [under section 14] must come in and put itself on the same footing and equality with other appropriators of water and make an appropriation under our laws so that those that are ahead will be ahead of water-power companies authorized under this act; and those who are behind will be behind the new power company; in other words, *they will have to come in on an equality with all other water users and acquire and use their water rights under our State water-rights laws* and under the acts of Congress and laws by which those rights were acquired." *Id.* at 14071 (remarks of Rep. Taylor) (emphasis added).

Congressman Seldomridge of Colorado supported Congressman Taylor's interpretation, stating that:

> "The gentleman is right. *The power company will have to come in and conform to the laws of the State.* [¶]. . . *There must be some clear and definite declaration made in this legislation that Congress does not intend to question the right of the State to control the waters of the State.* The powers and privileges granted by this act must be subject to this recognition, and the presence of this section in the bill is necessary to inform all intending lessees of water-power sites under Federal jurisdiction that while they can operate under Federal law as far as the land is concerned, . . . yet when they come to the use and appropriation of water that they must recognize the laws of the State as superior to any Federal grant. [¶] . . . The operation of hydroelectric power companies does not present any complicated problem that can not be regulated by State law. The people are well informed in these days of the dangers and abuses of monopolies. They are protecting themselves by municipal, State, and national legislation. The Government with all of its national obligations can well afford to relieve itself of responsibilities and powers that can be more satisfactorily exercised by the States." *Id.* (remarks of Rep. Seldomridge) (emphasis added).

Although the House approved H.R. 16673, the Senate failed to approve the bill because of its objection to a provision imposing water use fees against licensed hydropower projects. In the Senate's view, the federal government potentially lacked constitutional authority to impose the fees because the states "owned" the water. S. Rep. No. 898, 63d Cong., 3d Sess. 1 (1915); H.R. Rep. No. 61, 66th Cong., 1st Sess. 4 (1919); 59 Cong. Rec. 1040 (1920) (remarks of Sen. Nelson).[13] Indeed, the delay in enacting hydropower legislation from 1914 until 1920 was caused by Congress' doubts concerning the constitutionality of the proposed fees. See note 13, *supra*. Congress' solicitude for state "ownership" interests lends strength to the view that Congress did not intend to override traditional state water rights authority in enacting the FPA.

B. H.R. 408 (64th Congress)

In the next session, the House considered H.R. 408, which was virtually identical to H.R. 16673, the bill considered in the previous session. H.R. Rep. No. 16, 64th Cong., 1st Sess. 1 (1916). Section 14 of H.R. 408 was virtually identical to section

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[13] Senator Nelson described the congressional efforts during this period as follows:

> "The majority of the Senate held the view that, aside from the interests of commerce, . . . all other property rights in the waters of a stream belong to the respective States, and that the Federal Government ought not to charge compensation for what is State property and not Federal property; in other words, the majority of the Senate has consistently contended for the idea that the streams and rivers of the country were the property of the States in which they were situated, and that the Federal Government had control of those streams only to the extent that the interests of commerce and navigation demanded; that, aside from that, all other use and all other property in the waters belonged to the State or to riparian owners, as the case might be." 59 Cong. Rec. 1940 (1920) (remarks of Sen. Nelson).

14 of H.R. 16673, which as noted above was the predecessor of section 27. The report of the House Committee on the Public Lands contained a detailed analysis of the bill, and, under the colorful subtitle "Does Not Molest The Right Of States In Their Use Of Water," stated that:

> "The bill studiously avoids any interference with the rights of the States in handling their water power problems; it expressly disclaims any right to trample on the rights of the States and no such attempt is even thought of or intended." H.R. Rep. No. 16, 64th Cong., 1st Sess. 14 (1916).

Congressman Taylor, the author of section 14, stated that the provision was modeled after section 8 of the 1902 Reclamation Act, declaring that:

> "The gentleman from Wyoming is familiar, of course, with the fact that *this is the language that was used in the original reclamation act of June 17, 1902*, and we put it in the Hetch Hetchy California bill, and I think I may claim the authorship of it in that bill and in this and other bills, to prevent any question arising as to whether or not Congress intended to in any way interfere with our water rights or doctrine of priority; and I am confident the sentiment of the West is very much in favor of retaining this language. . . . It has been approved a number of times by Congress. I put it in this bill when we reported it last year, and the House approved of it at the time we passed the bill last year." 53 Cong. Rec. 740 (1916) (remarks of Rep. Taylor) (emphasis added).

The Report of the Senate Committee on Public Lands commented on the Senate version of H.R. 408, and contained perhaps the clearest expression of Congress' intent to defer to state water rights laws. The report stated that:

> "*The bill distinctly recognizes the ownership of and the right of control in the States of the use of the waters in the flowing streams of the States.* In cases where latent power is going to waste in the streams of the States and where the land adjacent thereto and necessary for the location of power sites belongs to the United States Government this measure recognizes that there must be cooperation between the

> States which control the water and the United States Government, which controls the land. Neither alone can successfully develop water power. There must be cooperation to attain best results, and that this bill seeks to obtain by recognizing the right of the State to the use of the water and the right of the Federal Government to the use of the land and recognizing that both are essential to development of power. [¶] This bill in no wise seeks to encroach upon, impair, or destroy any of the rights of the States. *It is not intended in any way or in any degree to trench upon the right of the State to control of the water flowing in the streams within its borders. It is framed upon the distinct theory that the State owns and controls the use of the water flowing within the streams within its boundaries, and that the Federal Government owns and has the right to control and dispose of the public land bordering on and adjacent to such streams.* [¶] . . . *[T]he States alone cannot facilitate waterpower development nor provide legislation sufficient therefor, because the States control only the water.* It takes land as well as water in such cases to develop power. On the other hand, *the Federal Government alone can not furnish the facilities for the development of power, for the Federal Government owns only the land*, and it takes water as well as land to develop power. *Each must contribute its share. The Federal Government must contribute the use of land, and the State government must contribute the use of water. . . .*" S. Rep. No. 66, 64th Cong., 1st Sess. 4-5 (1916) (emphasis added).

Thus, the Senate report made clear that, although the federal government owns the lands, the states control the water rights.

A colloquy between Senator Myers, Chairman of the Senate Committee on Public Lands, and Senator Borah reaffirmed the primary of state water laws:

> "Mr. BORAH: May I ask the Senator from Montana to admit that before the National Government can utilize this water for power purposes it must go under the State law and make application for the water and secure it by an appropriation the same as an individual would have to do?

"Mr. MYERS: *The Federal Government is not undertaking to utilize any water at all. It furnishes the land, and the applicant must go to the State authorities to get the water.*

"Mr. BORAH: Suppose that in the development of power under this bill it should become essential for the National Government to exercise control over some of the water, could it do so without making an application to the State authorities for the purpose of appropriating it?

"Mr. MYERS: *Under the terms of this bill I can not conceive of any contingency in which the Federal Government would undertake to control the waters of a State.*" 53 Cong. Rec. 4204 (1916) (emphasis added).

Again, the Senate did not approve the bill because of constitutional doubts concerning federal authority to impose water use charges against hydropower projects. 59 Cong. Rec. 1040 (1920) (remarks of Sen. Nelson); see note 13, *supra*.

C. S. 1419 (65th Congress)

In December 1918, President Woodrow Wilson attempted to break the deadlock over hydropower legislation, and asked the House of Representatives to establish a joint committee to consider hydropower legislation. H.R. Rep. No. 715, 65th Cong., 2d Sess. 13-14 (1918). The House formed the Joint Water Power Committee, consisting of members of the committees on Interstate and Foreign Commerce, Public Lands, and Agriculture. *Id.* The President also asked the Secretaries of War, Interior and Agriculture to draft an administration bill for hydropower development. *Id.* After the administration bill was completed, the House joint committee considered the bill in lengthy hearings. Hearings Before the House Committee on Water Power Legislation, 65th Cong., 2d Sess., pts. 1, 2, 3, 4 (1918).[14] At the

[14] The hearings made clear that the administration bill required hydropower projects to comply with state water laws. The Chief Engineer of the Forest Service, describing the provision subsequently enacted as section 9(b), testified that the license applicant "shall file, as part of his application for license, authority from the State to use the water for the purposes proposed." Hearings Before the House Comm. on Water Power Legislation, 65th Cong., 2d Sess. 97 (1918). Congressman Mondell, describing the provision subsequently enacted as section 27, testified that "no one can begin or carry out any of these power developments in the public-land States until and unless they have secured from the proper State authorities the right to divert the water." *Id.* at 654.

conclusion of the hearings, the House joint committee incorporated the administration proposal in a preexisting power bill, S. 1419, and reported the bill to the full House. The bill contained two provisions, sections 9(b) and 27, similar to the anti-preemption provisions contained in the FPA. H.R. Rep. No. 715, 65th Cong., 2d Sess. 6, 13 (1918).

The congressional floor debates relating to S. 1419 indicate that Congress intended to defer to state water law. Congressman LaFollette of Washington, a member of the House joint committee, stated that the bill recognized and respected the states' sovereign interests in their navigable waters. 56 Cong. Rec. 9108-9111 (1918) (remarks of Rep. LaFollette). LaFollette, citing this Court's decisions in *Martin v. Waddell*, 41 U.S. 367 (1842), *Kansas v. Colorado*, 206 U.S. 46 (1907), and their progeny, stated that these decisions reaffirmed "the States' sovereignty and right of control of the water, beds and banks" of navigable waters, avowing that the federal government does not have "any proprietary rights" in such waters except the right to regulate and control navigation. 56 Cong. Rec. 9109 (1918). LaFollette also declared that the bill was intended to overcome the "divided authority" that prevented hydropower development, noting that federal authority over hydropower projects was dispersed among the Secretaries of War, Interior and Agriculture. *Id.* LaFollette stated that:

"[M]any power possibilities would have long ago been developed and be giving service to man if it were not for a *divided authority. While the right of water control* and the ownership and jurisdiction of bed and banks of our watercourses *are admittedly in the States*, the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals rights to build dams across the streams, because the Govern-

ment could intervene and stop proceedings under the plea of control of navigation." *Id.* (emphasis added).

Thus, LaFollette argued that "divided authority" was impeding hydropower development because different federal agencies could prevent the construction of hydropower projects that had acquired water rights under state law. The solution, he argued, was to concentrate federal licensing authority in a single agency and to allow the states to continue exercising water rights authority over the projects. According to LaFollette:

> "The three working together [the Secretaries of War, Interior and Agriculture, who were to serve on the Commission] can harmonize all questions involving Federal interests, and under the proposed law the would-be licensee is supposed to have procured *all concessions and necessary powers of the State or States* in which the project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution." *Id.* at 9110. (emphasis added)

LaFollette's statements indicate that Congress intended to remove *federal* obstacles to hydropower development caused by dispersal of authority at the federal level, and that Congress did not intend to remove the projects' obligation to acquire "concessions and necessary powers" from the states.[15]

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[15] LaFollette's statements related primarily to section 9(b), which describes the project operator's evidentiary burden in FERC proceedings. The congressional debates were unclear as to whether this provision requires the operator to acquire a state water right as a *condition precedent* to acquiring a FERC license, or instead whether the operator can acquire a state water right *after* acquiring a FERC license but prior to diverting water. Congressman LaFollette indicated that section 9(b) requires the operator to acquire a state water right as a condition precedent to the federal license, stating that:

> "If we make it one of the *conditions precedent* to the procuring of a license that the applicant has complied with the requirements of State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or a license cannot issue." 56 Cong. Rec. 9110 (1918) (remarks of Rep. LaFollette) (emphasis added).

A colloquy between Congressmen Mondell and Raker, however, suggested the opposite view. Congressman Raker offered an unsuccessful amendment to section 9(b) that would have required an applicant to show only that he had filed an "application" for a water right under state law, not that he had actually acquired the right. 56 Cong. Rec. 9812 (1918). Congressman Mondell responded that the amendment was unnecessary because section 9(b) did not require that the applicant have a "completed" water right in filing his application. 56 Cong. Rec. 9813 (1918) (remarks of Rep. Mondell). According to Mondell:

> "I think the gentleman [Congressman Raker] must have offered his amendment under a misapprehension of the meaning and effect of the provision [section 9(b)]. The gentleman is assuming that the language which he attempts to amend required a completed water right and a water-right certificate *before* the party shall be granted a license under this act or his application be considered. This is not true at all. The provision is that the applicant . . . shall have complied with all of the laws of the State applicable to the situation *up to the time that he makes his application. . . . [T]here are other requirements of State law that will apply after the license has been granted and construction begins*, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements." *Id.* (emphasis added).

This colloquy suggests that section 9(b) requires the applicant to show the steps taken to comply with state water law prior to filing his application with FERC, and that section 27—which, in Congressman Mondell's words, requires compliance with "other requirements of state law that will apply after the license has been granted"—requires the applicant to acquire a "completed" state water right prior to diverting water.

Other congressmen supported the same view. Congressman Mondell stated that:

> "The waters belong to the people of the States and the only property that the Federal Government has is land. . . . *The bill . . . expressly disavows any intent or purpose of taking*

over control of the waters from the States." 56 Cong. Rec. 9113, 9114 (1918) (remarks of Rep. Mondell) (emphasis added).

Congressman Taylor stated that:

> "[A]fter strenuous efforts I succeeded . . . in getting section 27 into this bill, which is the saving clause of our irrigation rights and is *copied from the reclamation act.*" *Id.* at 9115 (remarks of Rep. Taylor) (emphasis added).

Congressman Doremus stated that "water-power companies organized under this act will be obliged to operate under the laws of the various States." *Id.* at 9768. Congressman Raker stated that the federal licensee "gets its rights by applying to the State for it . . . ." *Id.* at 9902. Congressman Myers stated that:

> "I believe that it is the intention of the bill, as it was of bills that emanated in times past from the Public Lands Committee of the Senate, merely to control, regulate, and dispose of the use of public lands through which the water flows. *It is not intended to interfere with the ownership and control by the State of those waters. . . .* [¶] *The State controls the use of the water, the Federal Government controls the use of the public land through which the water flows. The consent of each must be obtained.*" *Id.* at 10494 (remarks of Rep. Myers) (emphasis added).

The House and Senate passed different versions of S. 1419 and the differences were resolved in a conference bill. H.R. Rep. No. 61, 66th Cong., 1st Sess. 1 (1919). The House approved the conference bill, but the Senate failed to approve the bill before the end of the session. *Id.* In the next session, Congress enacted H.R. 3184, which was identical to S. 1419, and President Wilson signed the measure into law. *Id.*[16] After years of deliberation, the

[16] The Senate debate relating to H.R. 3184 reaffirmed Congress' intent to defer to state water laws. Senator King of Utah inquired whether the bill would create an "oppressive and bureaucratic system of [federal] licensing" that would be "oppressively laid upon the States." 59 Cong. Rec. 1040 (1920) (remarks of Sen. King). Senator Nelson, who led the floor discussion of the bill, denied the charge and referred Senator King to section 27 of the bill. *Id.* at 1040 (remarks of Sen. Nelson).

FPA finally became law. The FPA contained two provisions, sections 9(b) and 27, that recognized state water rights authority over hydropower projects.

D. Summary

The legislative history makes clear that Congress, in enacting section 27, continued and extended its traditional policy of deference to state water law. Indeed, the legislative history indicates that Congress specifically followed the precedent of section 8 of the 1902 Reclamation Act, which makes state water laws applicable to federal reclamation projects. Hence, the congressional policy of "purposeful and continued deference to state law" that informs section 8, *California*, 438 U.S. at 653, equally informs section 27. In effect, Congress required hydropower projects to comply with state water laws to the same extent that federal reclamation projects must comply with state laws. In light of the progenitive relationship between sections 8 and 27, there is no principled basis for construing the provisions differently.[17]

[17] Following enactment of the FPA in 1920, FERC's predecessor, the Federal Power Commission (FPC), consistently construed the FPA as requiring federally-licensed hydropower projects to comply with state water laws. See, *e.g.*, FPC, Third Annual Report, at 8 (1923); FPC, Fourth Annual Report, at 10- 11 (1924); FPA, Seventh Annual Report, at 3 (1927). For instance, the FPC stated in 1924 that:

> "The development of water power on the lands of the United States requires the approval of both the State and Federal Governments, the former granting the right to use the water, the latter the right to use the land. Under the Federal water power act a license may not be issued until an applicant has secured its water rights from the appropriate State authority." FPC, Fourth Annual Report, at 10-11 (1924).

Indeed, the FPC stated in 1927 that the states have the right to "veto" hydropower projects that are unable or unwilling to comply with state water laws. FPC, Seventh Annual Report, at 3 (1927). In 1931, the FPC stated that:

> "Congress, in this legislation, perhaps more than in any other piece of legislation on similar subjects, has sought to protect and preserve to the States not only the rights, privileges and benefits of the State

IV. THIS COURT'S DECISION IN *FIRST IOWA* IS DISTINGUISHABLE HERE, AND ITS DICTUM CONCERNING SECTION 27 IS INCORRECT

The Ninth Circuit held that the preemption issue here is controlled by *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946). Pet. App. 10. In *First Iowa*, the FPC denied a license application for a hydropower project on grounds that the project had failed to acquire a use permit as required under Iowa law.[18] The denial was based on section 9(b) of the FPA, which requires project operators to submit "satisfactory evidence" of compliance with state law in applying for a FERC license. 16 U.S.C. § 802(b). This Court overturned the FPC order on grounds that section 9(b) does not require the project operator to acquire a state permit as a condition precedent to acquiring an FPC license. According to the Court, section 9(b) merely requires operators to provide

in the resource itself, but its power, through local governmental action, to regulate and control the resources thus developed to the advantages of its citizens." FPC, Eleventh Annual Report, at 12 (1931).

The FPC's administrative practice is described more fully in the *amici curiae* brief of the States of Idaho, *et al.*, and will not be repeated here. The FPC's contemporaneous construction is relevant because "particular weight" is accorded the "*contemporaneous* construction" of a statute by the agency charged with its enforcement. *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-668 (1979) (emphasis added), quoting from *Norwegian Nitrogen Co. v. United States*, 228 U.S. 294, 315 (1933). California has lodged the foregoing FPC reports with the Clerk with a request that they be judicially noticed.

[18] The relevant Iowa statute prohibited the construction of a dam without a use permit issued by the Iowa Executive Council, and provided for issuance of the permit only if the dam would not materially obstruct navigation or other "public rights" and only if the diverted water was returned to the stream without diminution of quantity or quality. 328 U.S. at 165-166. The Iowa statute did not define or otherwise relate to the riparian or appropriative water rights of the dam operator, and indeed the hydropower project in *First Iowa* possessed necessary riparian water rights under Iowa law. 328 U.S. at 158. Hence, *First Iowa* was not a water rights case, unlike the instant case.

"information" in the FPC proceedings concerning steps taken to comply with state law, but does not substantively require projects to acquire a state permit as a "condition precedent or administrative remedy that must be exhausted before securing a federal license." *Id.* at 170, 175. Otherwise, the Court stated, Iowa would have a "veto power" over the project, thus creating a "dual system of control" that would be "unworkable." *Id.* at 164, 167-168.

The *First Iowa* Court distinguished section 9(b) from section 27, stating that the latter provision, unlike the former, requires substantive compliance with state water law. 328 U.S. at 175-178. The Court then commented on section 27 itself, stating that the reference to "irrigation," "municipal" and "other uses" implies that provision is limited to "proprietary rights" and thus does not authorize state "regulation" of hydropower uses. *Id.* at 175-176. Since the Court *held* only that section 9(b) does not require a state permit as a "condition precedent" to a FERC license, the Court's comments concerning section 27 were dictum.

A. Invalidity of *First Iowa* Dictum After *California*

The *First Iowa* dictum concerning section 27 is invalid after this Court's decision in *California v. United States*, which was decided thirty-two years after *First Iowa*. In *California*, this Court held that section 8 of the 1902 Reclamation Act requires the Secretary of the Interior to acquire water rights under state law and to comply with conditions attached to such rights. 438 U.S. at 665, 667. Since section 27 was modeled after section 8, *California* supports the view that section 27 imposes the same obligation on private hydropower projects. Indeed, *California* specifically rejected the argument that the reference in section 8 to "irrigation" uses implies that the provision is limited to "proprietary rights," which was the same argument that *First Iowa* upheld in construing section 27. See note 4, *supra*. The *California* Court stated that the "proprietary rights" argument "would trivialize the broad language and purpose of § 8." 438 U.S. at 675. In light of the progenitive relationship between the provisions, the "proprietary rights" argument would equally trivialize the broad language and purpose of section 27. Hence, after *California*, the *First Iowa*

dictum that section 27 is limited to "proprietary rights" cannot be sustained.

Indeed, the *First Iowa* dictum was specifically based on the premise that section 8 of the 1902 Reclamation Act is limited to "proprietary rights," and *California* flatly rejected this premise. The *First Iowa* Court stated that section 27 is "similar to" section 8 in that both require compliance with state laws relating to the "control, appropriation, use, or distribution" of water. 328 U.S. at 176 n. 20. The Court then stated that:

> "The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to *proprietary rights under the reclamation law and in public lands, carries that established meaning [of section 8] into the Federal Power Act*, in the absence of anything in the Act calling for a different interpretation of the language." *Id.* (emphasis added).

Thus, in *First Iowa*'s view, section 27 "carries" the established meaning of section 8 "into" the FPA, and—since section 8 is limited to "proprietary rights"—section 27 is similarly limited. To be sure, *First Iowa*'s view that section 8 is limited to "proprietary rights" was consistent with this Court's contemporaneous view of that provision, as expressed in dicta in *Ivanhoe Irrigation Dist. v. MacCracken*, 357 U.S. 275, 292 (1958), and *City of Fresno v. California*, 372 U.S. 627, 630 (1963). In *California v. United States*, however, this Court specifically "disavow[ed]" the dicta in *Ivanhoe* and *City of Fresno* that section 8 is limited to "proprietary rights." 438 U.S. at 672-674, & n. 24. The *California* Court ruled that section 8 "does, of course, provide for the protection of vested water rights, but it also requires the Secretary [of the Interior] to comply with state law in the 'control, appropriation, use, or distribution of water.'" *Id.* at 675. Since *California* rejected the argument that section 8 is limited to "proprietary rights," *California* rejected the premise of *First Iowa's* dictum concerning section 27.[19]

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[19] In two other cases—one decided before and the other after *First Iowa*—this Court held that section 27 precludes FPC licensees from interfering with prior water rights recognized under state law, but the Court did not consider whether section 27 authorizes state regulation of hydropower water uses. *Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930) (FPC licensee cannot divert water belonging to upstream riparian user whose rights are recognized under state law); *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954) (FPC licensee must respect usufructuary water rights recognized under state law). In construing section 27, *Niagara Mohawk* specifically relied on *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), which held that section 8 of the 1902 Reclamation Act does not authorize federal acquisition of water rights without payment of compensation. *Niagara Mohawk*, 347 U.S. at 255. Since *Niagara Mohawk* relied on section 8 in interpreting section 27, *Niagara Mohawk* supports the view that the provisions should be construed congruently. This view is also supported by *Gerlach* itself, which states that section 8 "parallels" section 27. 339 U.S. at 734.

B. Inconsistency of *First Iowa* Dictum With Legislative History

The *First Iowa* dictum is inconsistent with the legislative history of section 27, which unequivocally indicates that Congress intended to defer to state regulatory water laws. See pages 22-35, *supra*. Indeed, the *First Iowa* Court did not refer to the voluminous legislative history concerning section 27 described earlier in this brief, and the parties did not provide this full legislative history to the Court. The *First Iowa* Court stated, however, that its "proprietary rights" theory was consistent with Representative LaFollette's assertion that section 9(b) preserves "property rights of the State" and that Congress was attempting to overcome "divided authority." 328 U.S. at 174; see 56 Cong. Rec. 9810 (1918) (remarks of Rep. LaFollette). As we have noted, LaFollette's reference to state "property rights" was a reference to state "proprietary" rights in water under the equal footing doctrine, and, as LaFollette directly observed, this Court has held that such state "proprietary" rights include the right to regulate water use. *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907); see *California*, 438 U.S. at 654-655; see page 31, *supra*. As we have also noted, LaFollette's reference to "divided authority" indicated only that all *federal* licensing authority should be concentrated in a single agency, not that state water laws should be displaced. See pages 31-32, *supra*.

C. Dual Regulatory Systems

The *First Iowa* Court, stating that a dual regulatory system would be "unworkable," 328 U.S. at 167-168, appeared to regard dual systems as suspect if not inherently improper. Indeed, the Court almost seemed to adopt a federal common law rule presumptively construing federal statutes against dual systems.[20] More recently, however, this Court has often sustained dual systems, correctly reasoning that the choice belongs to Congress and not the courts. In *California*, for example, this Court upheld a dual regulatory system in the field of reclamation, stating that state laws apply to federal reclamation projects to the extent that state laws are not inconsistent with "clear congressional directives." 438 U.S. at 672, & n. 25.

In fact, Congress often provides for concurrent federal and state jurisdiction over activities that affect both national and state interests. For example, the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, authorizes the Army Corps of Engineers (ACE) to exercise permit authority over activities affecting navigable waters. The ACE's permit authority extends to diversions from navigable waters authorized under state water rights laws. See *California v. Sierra Club*, 451 U.S. 287 (1981). In effect, the ACE and the states exercise concurrent jurisdiction over water diversions that affect both federal navigation interests and state water rights interests. Moreover, the ACE considers many of the same "public interest" factors that the states consider in exercising their water rights authority. Compare 33 CFR § 320.4(a), 40 Fed. Reg. 31326-31327 (1975), with Cal. Water Code §§ 1253, 1255, 1257. Nonetheless, this Court has held that

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[20] In a recent case, the Ninth Circuit purported to rely on the "*First Iowa* doctrine" in holding that the states cannot permissibily regulate activities that are regulated by federal permit programs, thus apparently construing *First Iowa* as adopting a common law doctrine precluding dual systems. *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1082, 1083 (9th Cir. 1985), *rev'd sub nom* 480 U.S. 572 (1987). This Court reversed the Ninth Circuit decision without making reference to any "*First Iowa* doctrine." 480 U.S. 572. The Ninth Circuit's reference to such a "doctrine" demonstrates the continuing mischief caused by the *First Iowa* analysis.

an ACE permit does not relieve the permittee of his obligation to comply with state water rights laws. *Cummings v. Chicago*, 188 U.S. 410, 431 (1903).[21] As this Court has stated in another context, the federal license is "simply acknowledgement that the activity does not violate federal law, and is not an exemption from state licensing or police power requirements." *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). Similarly, a FERC license is an "acknowledgement" that the activity does not violate federal law, not an exemption from state water rights laws. Contrary to the *First Iowa* dictum, dual systems are neither unprecedented nor "unworkable."[22]

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[21] In *Cummings*, this Court stated that:

> "[T]he act of 1899 does not manifest the purpose of Congress . . . to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. . . . [U]nder existing legislation they [private parties] must, before proceeding under such an authority, obtain . . . the assent of the State acting by its constituted agencies." 188 U.S. at 431.

[22] Congress has provided for concurrent state jurisdiction over other kinds of federally-licensed activities. See, *e.g.*, *Hillsborough County Florida v. Automated Medical Laboratories*, 471 U.S. 707 (1985) (state operating requirements apply to blood plasma vendors licensed under federal law); *Pacific Gas & Elec. Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983) (state economic regulation applies to nuclear power facilities licensed by the Atomic Energy Commission); *Rice v. Rehner*, 463 U.S. 713 (1983) (state licensing requirements apply to federally-licensed Indian traders on Indian reservations); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (state licensing requirements apply to marine terminal facilities licensed under federal law); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state certification requirements apply to agricultural commodities certified under federal marketing orders); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (state conservation laws apply to fish traps authorized by permits issued by U.S. Forest Service); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (state regulations apply to smoke emissions of vessels licensed under federal law); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 207-208 (1944) (state licensing

D. Distinction Between *First Iowa* and Instant Case

The actual holding in *First Iowa* is distinguishable here. The *First Iowa* Court held that section 9(b) is an "informational" provision only and thus does not require a hydropower project to acquire a state permit as a "*condition precedent* or administrative remedy that must be exhausted *before securing a federal license*." 328 U.S. at 170 (emphasis added). Indeed, the petition for writ of certiorari in *First Iowa* framed the question in terms of whether section 9(b) required a state permit as a "condition precedent" to a FERC license.[23] This question is inapposite here because the Rock Creek project has already acquired a FERC license and California does not challenge the issuance of the license. Instead, the question here is whether section 27—as opposed to section 9(b)—independently requires the project to comply with state water laws irrespective of its rights and obligations under the FERC license. In other words, the question is whether the project must acquire a state water right prior to diverting water, and must thereafter comply with conditions attached to the right. This question was not presented in *First Iowa*, which focused on the meaning of section 9(b) in FERC proceedings. Conceivably section 9(b) might be construed, as in *First Iowa*, as an "informational" provision that does not require a state permit as a "condition precedent" to a FERC license, even though section 27 requires, and must be construed as requiring, substantive compliance with state water laws. Although we take no position concerning the proper construction of section 9(b), this suggested construction would enable the Court to sustain California's position here without overturning its actual holding in *First Iowa*.[24]

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requirements apply to custom house brokers licensed under federal law); *United States Steel Corp. v. Train*, 566 F.2d 822, 830, & n. 5 (7th Cir. 1977) (state has concurrent jurisdiction to regulate water pollution under section 510 of Clean Water Act).

[23] The petition for writ of certiorari in *First Iowa* stated that:
"The dominant issue underlying the questions presented is whether *Section 9(b) of the Federal Power Act*, is to be so construed that the State of Iowa, and all other states and territories of the United States, may by statute require a state or territorial permit or license for the construction of a power project, upon navigable waters of the United States, as a *condition precedent* to the issuance of a federal license under Part I of the Federal Power Act." Pet. for Writ of Cert., *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, at 8-9, No. 603, Oct. Term, 1945 (emphasis added).

V. FERC'S PREEMPTION ARGUMENT WOULD (1) RESULT IN POTENTIALLY INCONSISTENT REGULATION OF WATER RIGHTS IN THE SAME RIVER AND (2) IMPAIR THE STATES' INTERESTS IN ALLOCATING THEIR LIMITED WATER SUPPLY AMONG COMPETING NEEDS

A. Inconsistent Water Rights Regulation

Congress, in its traditional deference to state water rights laws, has recognized the need for coordinated state management and regulation of water rights in individual river systems. As this Court has stated, water rights are "highly interdependent" because many users compete for a finite and scarce resource that is often inadequate to serve all needs, and hence there is a need for "comprehensive state systems for adjudication of water rights." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); see *Nevada v. United States*, 463 U.S. 110, 140 (1983). FERC's preemption argument would impair the states' ability to coordinate and manage water rights by exempting hydropower projects from state laws that apply to all other users in the same river, including, after *California*, the United States

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[24] Additionally, such a construction would avoid creating a conflict between federal and state law, because state water laws typically provide only that appropriators must acquire water rights prior to diverting water, see, *e.g.*, Cal. Water Code § 1225, not that hydropower projects must acquire state permits as a "condition precedent" to acquiring FERC licenses. Such a construction does not impair state water rights interests because it is often inefficient for states to conduct lengthy water rights hearings for projects that are unlikely to acquire FERC licenses. As noted earlier, the legislative history of the FPA—although clearly indicating that hydropower projects must acquire state water rights and comply with conditions attached to the rights—is unclear on whether a state water right is a "condition precedent" to the FERC license. See note 15, *supra*.

itself. In effect, FERC's argument would create two bodies of law in the same river—a body of FERC-created law applicable to hydropower projects and a body of state law applicable to all other users—thus causing potentially inconsistent regulation of water rights in the same river.

To provide an example of such potentially inconsistent regulation, suppose that a hydropower project in a particular river is sandwiched between an upstream municipal diversion project and a downstream federal reclamation project. Clearly the upstream municipal project must comply with state law. After *California*, the downstream federal project must also comply with state law. Under FERC's argument, the hydropower project located between these projects need *not* comply with state law. Thus, the state would be unable to provide for coordinated management of water rights for the three projects. If, for example, the state established minimum flow requirements for all three projects for the protection of fish, the hydropower project could capture for its own use the flows that the state requires to bypass other upstream projects, thus defeating the purpose of the state flow requirements as applied to the other projects. The state cannot effectively manage and coordinate water rights unless state laws apply to *all* users, including hydropower projects. As Congress has declared, "[I]t is essential that each and every owner along a given water course . . . must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951), quoted in *California*, 438 U.S. at 678-679.

Indeed, FERC's preemption argument would result in potentially inconsistent regulation of *hydropower* projects, in that *private* hydropower projects would be exempt from state laws that apply to *federal* hydropower projects. Congress, in authorizing federal reclamation projects, often provides that the projects must serve multiple purposes, including hydropower uses. See, *e.g.*, *California*, 438 U.S. at 651 (describing multiple purposes of New Melones Project, including hydropower purposes). Under section 8 of the 1902 Reclamation Act, state water laws apply to *all* purposes of federal reclamation projects, including hydropower purposes. *United States v. California*, 694 F.2d 1171, 1179-1180

(9th Cir. 1982) (Kennedy, J.) (on remand of *California*, state water laws held to apply to hydropower purposes of New Melones Project). Indeed, the FPA does not even apply to federal projects, see *Uncompahgre Valley Water Users Ass'n v. FERC*, 785 F.2d 269 (10th Cir. 1986), and hence, even apart from the effect of section 8, the FPA does not preempt state laws as applied to federal hydropower uses. Therefore, under FERC's preemption argument, state laws would apply to *federal* power projects but not to *private* power projects. Nothing in the FPA indicates that Congress meant to anomalously exempt private power projects from state requirements that apply to federal power projects. To the contrary, section 27 indicates that both projects must meet the same requirements.

B. State Interest In Allocating Water

Congress, in its deference to state water laws, has also recognized that the states have legitimate interests in allocating their scarce water supply among competing public and private needs. The American West—depicted by nineteenth-century cartographers as the "Great American Desert," *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935)—suffers from conditions of aridity that do not exist elsewhere in the nation. Because of water scarcity, the allocation of water in the West determines the nature and extent of economic growth, and the balance between economic growth and environmental quality. For example, the diversion of water from the Sacramento-San Joaquin Delta for agricultural needs in the Central Valley or domestic needs in Los Angeles, reduces the availability of water for competing economic and environmental needs in the northern part of California. See *United States, et al. v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986). In balancing such competing needs, the state makes important policy judgments concerning its economic and social order. As the California Supreme Court has declared:

> "The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence." *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 702 (1933).

In enacting section 27, Congress ensured that the states would retain their traditional water rights authority to balance hydropower needs against competing needs.

The western states have developed a unique body of water law to achieve maximum utilization and conservation of their limited water supply. This body of law, the doctrine of "prior appropriation," provides that water rights exist only to the extent that water is put to "beneficial use" as determined under state law. See, *e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441-444 (1983). The appropriation doctrine, unlike the common law riparian doctrine, provides for comprehensive state management and regulation of water rights. Most western states have created state agencies that administer their appropriation systems. In California, the appropriation system is administered by the State Board, which has special expertise in water rights regulation. As the California Supreme Court has noted, the State Board's function has "steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of water." *National Audubon Society*, 33 Cal.3d at 444.

In exercising its water rights authority, the State Board is authorized to issue permits for water uses that, in the Board's judgment, are "reasonable and beneficial" and in the "public interest." Cal. Water Code §§ 174, 1253, 1255, 1257; *Environmental Defense Fund v. East Bay Muni. Util. Dist.*, 26 Cal.3d 183, 195 (1980). In considering these factors, the State Board must consider "all beneficial uses" of water, including, *inter alia*, the need for "preservation and enhancement of fish and wildlife" and any relevant "power" needs. Cal. Water Code § 1257. Thus, in acting on the Rock Creek application here, the State Board is specifically mandated to consider fish needs in relation to power needs. Indeed, the California Constitution provides that water rights exist only to the extent that water is put to "reasonable and beneficial" use under California law, Cal. Const., Art. X, § 2, and the State Board relied on this constitutional provision in establishing flow rates in this case. D 1596, at 8 (J.A. 59). Hence, the

Rock Creek project's obligations under state law derive from the California Constitution itself.

FERC's preemption argument would impair the states' traditional water rights authority by authorizing FERC to exercise *exclusive* jurisdiction over hydropower uses that the states have traditionally regulated and controlled. Under its argument, FERC would function as a super water rights agency, with final authority to determine how much water is available for hydropower development and thus how much water is available for all other uses. Under its argument, FERC could allocate disproportionate quantities of water for hydropower development—in keeping with its primary mission to provide such development—and thereby reduce availability of water for domestic, environmental, agricultural or other uses that the state believes to be vital to the welfare of its citizens. For example, FERC could allocate most or all of the streamflow for immediate downstream hydropower production, thus preventing the state from reserving substantial water for future upstream needs of its growing communities. As in this case, FERC could impose relatively modest flow requirements—relying as here on the project operator's own flow recommendations—and prevent the state from protecting downstream fish resources that belong to all the people of the state. These kinds of policy judgments, in their totality, affect the character of society and the quality of the world that it inhabits. In enacting section 27, Congress ensured that the states would retain their traditional water rights authority to make such policy judgments.

VI. THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL REGULATION IN THIS CASE

As we have explained, section 27 provides that hydropower projects must comply with state water laws irrespective of any rights and obligations under a FERC license, with the caveat that state laws cannot be applied if they conflict with "clear congressional directives." Cf. *California*, 438 U.S. at 672, & n. 25. Therefore, the states have the right to deny water rights permits for—in effect, to veto—projects that fail to comply with state law, assuming that the state action does not conflict with a clear congressional directive. The states have the same veto authority over FERC-licensed hydropower projects that they have over

water projects licensed by the Army Corps of Engineers under the Rivers and Harbors Act of 1899, projects that, as this Court has held, must have the "concurrent and joint assent of both the National Government and the state government." *Cummings v. Chicago*, 188 U.S. 410, 431 (1903); see pages 40-41, & n. 21, *supra*. As we have noted, section 27 was patterned after section 8 of the 1902 Reclamation Act, and this Court has held that, under section 8, "Congress did not intend the Secretary of the Interior to initiate the project" "if state law did not allow the appropriation or condemnation of the necessary water." *California*, 438 U.S. at 669 n. 21. Indeed, FERC's predecessor, the FPC, stated in its 1927 annual report that "it is possible for either agency [the FPC or the state water rights agency] to halt development by interposing its veto." FPC, Seventh Annual Report, at 3 (1927); see note 17, *supra*. Since no "clear congressional directives" preclude California from imposing its flow requirements here, California's flow requirements are applicable under section 27.

Indeed, apart from the fact that California law does not conflict with a congressional directive, California law does not even conflict with the FERC license itself. California, rather than exercising its authority to deny a water right permit for the Rock Creek project, has granted the permit. Thus, the project can lawfully divert water under both the state permit and the federal license, and there is no conflict between the permit and license in that respect. This case is distinguishable from *First Iowa* on this ground because, as the *First Iowa* Court noted, the Iowa statute involved in that case effectively vetoed the project by prohibiting construction of the dam. *First Iowa*, 328 U.S. at 166-167.

Additionally, there is no conflict between the State Board permit and the FERC license with respect to minimum flow requirements, for the State Board has imposed more stringent flow requirements than FERC. Hence, the project, in complying with the State Board's more stringent requirements, will necessarily comply with FERC's less stringent requirements. The FERC requirements are, by their terms, "minimum" requirements and do not preclude the project from meeting higher requirements. License Order, at 8 (J.A. 25). The State Board requirements, rather than frustrating the purpose of the FERC requirements,

provide greater protection of the fish resource that is the subject of the FERC requirements. The project can meet its obligations under both federal and state requirements and is not required to choose between them. Therefore, there is no conflict between state and federal flow requirements in this case. In any event, whether or not California's requirements somehow "conflict" with FERC's lesser requirements, California's requirements are applicable because they do not conflict with a "clear congressional directive."

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the decision below and remand the case for further proceedings consistent with its opinion.

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QUESTION PRESENTED

1. Whether this Court should now overrule its decisions in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), that the effect of section 27 of the Federal Power Act is limited to "control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature*" (italics added), even though the language, structure and legislative history of the Act demonstrate an intent to commit comprehensive regulatory authority to the Federal Power Commission.

Or, to put the same question more specifically:

2. Whether the Federal Power Act preempts a state from regulating the manner of operation of a federally licensed hydropower project located on a non-navigable stream on federal land, where all water is returned to the stream, no state water rights are implicated and no other water user's rights are affected.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-333

STATE OF CALIFORNIA,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION and ROCK CREEK LIMITED PARTNERSHIP,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT ROCK CREEK LIMITED PARTNERSHIP

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-13) is reported at 877 F.2d 743 (9th Cir. 1989). That opinion affirmed the Federal Energy Regulatory Commission's Order in Response to Request for Declaratory Order and Providing for Hearing (Pet. App. 14-22), reported at 38 F.E.R.C. ¶ 61,240 (1987), and its Order Denying Rehearing (Pet. App. 23-36), reported at 41 F.E.R.C. ¶ 61,198 (1987).

STATEMENT OF THE CASE

1. Nature of the Controversy

The Rock Creek Hydroelectric Project (the "Project") is a small-scale hydroelectric power plant located on

Rock Creek, a small, non-navigable tributary of the South Fork of the American River, in El Dorado County, California. The Project does not have significant water storage capacity, but instead produces electricity by diverting water from the creek through a man-made tunnel to a powerhouse, where the water drives turbines that generate electricity. The water is returned to Rock Creek at its confluence with the South Fork of the American River, approximately 5,100 feet downstream from the point of diversion. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,117-18 (1987) (reprinted in the Appendix hereto).

Both the Project and the creek are located entirely on federally owned land administered by the Bureau of Land Management, except for a small portion owned in fee by the Partnership. Order Issuing License (Major), 23 F.E.R.C. ¶ 62,137, at 63,203 (1983) ("FERC License") (J.A. 13); Order WR 87-2, at 47-48 (Cal. St. Water Res. Control Bd. Mar. 19, 1987) (J.A. 83). By virtue of its FERC License, the Project is entitled to use "all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project." FERC License, 23 F.E.R.C. at 63,204 (J.A. 24). The Project's operation does not affect the water rights of others, as California conceded in related litigation:

> The State Water Board is not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.

Stipulation of Facts ¶ 17, *Rock Creek Limited Partnership v. State Water Resources Control Bd.*, No. S-87-0523 (E.D. Cal. Aug. 21, 1987) (J.A. 142).

2. Grounds for Issuance of the FERC License

In reviewing the June 1, 1982 license application for the Project, the Federal Energy Regulatory Commission ("FERC") considered the need for, and benefits to be derived from, the Project, the Project's economic feasibility, and the Project's potential environmental impact. *See* FERC License, *passim* (J.A. 13). On April 29, 1983 FERC approved the Project and issued the License. *Id.*

In accordance with the statutory mandate of section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a) (1982), FERC considered the "bypass flow"[1] levels that would be appropriate for the purpose of protecting the trout fishery in Rock Creek. FERC License at 63,201 (J.A. 15). Based upon its review of all available information, FERC concluded that "factors other than the quantity of available adult habitat" in Rock Creek "are limiting fish production" and that "the release of the minimum flows on an interim basis as proposed by [the licensee] would not adversely impact the fishery resources of Rock Creek." *Id.* at 63,201 (J.A. 15-16). Accordingly, FERC ordered that, until completion of a comprehensive fishery study, the Project "shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule . . .: May through September—11 cubic feet per second (cfs) and October through April—15 cfs." *Id.*, Article 37, at 63,204 (J.A. 25). In February 1984, approximately one year after the License was issued, the Water Board issued the Project a permit to appropriate water incorporating identical bypass flow requirements.

3. The Challenged FERC Rulings

Although the Water Board originally conformed its permit to the terms of the FERC License, in 1986 it con-

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[1] The "bypass flow" is the water flow that is not diverted from the creek for power generation but instead is left in the portion of the creek between the point of diversion and the point of return.

vened hearings on whether its permit should be amended to raise substantially the bypass flow under which the Project must operate. In response, the Partnership petitioned FERC for a declaratory order resolving which requirements, state or federal, would prevail. On March 11, 1987, FERC ruled that "the establishment of minimum flows is a matter beyond the reach of state regulation," 38 F.E.R.C. ¶ 61,240, at 61,773 (1987) (Pet. App. 17), that the flows stated in the FERC License prevailed over state requirements "irrespective of any action taken by [the State Board]" and that the "Rock Creek [Limited Partnership] must comply with the flow requirements of Article 37 of its [FERC License] until otherwise ordered by the Commission." *Id.* at 61,773, 61,774 (Pet. App. 18). Nonetheless, one week later the Water Board amended the permit it previously granted to require the Project to bypass 60 cfs in winter months and 30 cfs in summer.

In its March 11 order declaring exclusive FERC jurisdiction, FERC also scheduled hearings to allow the State Board and other interested parties to present evidence as to whether FERC should increase the Project's bypass flows. At those hearings, held later in 1987, California urged that the bypass flow specified by the FERC license be raised to 60 cfs in winter months and 30 cfs in summer. On November 16, 1987, the FERC administrative law judge issued an initial decision that the bypass flow should be raised to 20 cfs year round. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,122 (1987) (reprinted in the Appendix hereto). All parties have filed exceptions to that ruling, which remain under submission with FERC pending action in this case.

SUMMARY OF ARGUMENT

I.

As this Court held in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), the Federal Power Act invests the Federal Energy Regulatory Commission with comprehensive and exclusive authority to license and regulate the operations of hydropower projects on navigable waters and federal lands. The Act requires FERC to investigate proposed projects thoroughly, to consider the views of state agencies and others concerning the projects, and to require modifications of projects so that "in the judgment of [FERC they are] best adapted to a comprehensive plan for improving or developing a waterway or waterways . . . ." 16 U.S.C. § 803(a) (1982). Thus, the scheme centralizes in FERC the final authority, subject to the supervision of the federal courts, to hear all views and consider all factors. As the Court stated in *First Iowa*, this scheme leaves "no room or need for conflicting state controls." 328 U.S. at 181.

Contrary to California's argument, the state law savings clause contained in section 27 of the Act does not allow states to defeat this comprehensive federal scheme of regulation by enacting superseding state regulations. Instead, the effects of section 27 are to protect vested water rights and to preserve state primacy in the regulation of irrigation, municipal, and other water uses outside FERC's jurisdiction. In *First Iowa* and *FPC v. Oregon*, this Court affirmed the exclusive nature of FERC's jurisdiction over hydropower projects on navigable waters and federal land, respectively. These rulings were essential to the result reached in the cases: that applicants for FERC licenses need not show compliance with the state regulations involved, since those regulations are preempted. Continued adherence to the holdings of

First Iowa and *FPC v. Oregon*, which repeatedly have been relied upon by this Court, FERC, license applicants, and Congress itself, is essential to the orderly operation and regulation of the nation's hydropower system.

II.

The legislative history of the Federal Power Act amply supports the exclusive nature of FERC's jurisdiction to regulate hydropower projects on navigable waters and on federal land. Although earlier proposed hydropower legislation envisioned a narrower role for the Commission, the legislative history of the legislation actually enacted in 1920 forcefully demonstrates the broad and exclusive character of the Commission's licensing and regulatory jurisdiction. It also demonstrates that section 27 was not intended to prevent operation of this broad federal regulatory scheme, but instead was directed at protection of vested water rights and preservation of state authority to allocate water uses outside the scope of the Act.

III.

The decision in *California v. United States* that section 8 of the Reclamation Act of 1902 preserves state authority to impose conditions on the Secretary of the Interior's construction and operation of federal irrigation projects in no way undercuts *First Iowa*'s construction of the Federal Power Act. The Reclamation Act, unlike the Federal Power Act, creates no comprehensive federal scheme of regulation and lacks a broad federal purpose. Moreover, in contrast to section 27 of the Federal Power Act, section 8 of the Reclamation Act expressly preserves state regulatory authority concerning the primary subject of the Reclamation Act—irrigation—and explicitly provides that federal administration of the Act must be in full compliance with state law.

Furthermore, *California v. United States* ruled that even under the Reclamation Act, explicit congressional

directives will preempt state laws. Application of that rationale requires a finding of preemption in this case, since in section 10(a) of the Federal Power Act Congress directed FERC to modify hydropower projects so that in FERC's judgment they are best adapted to a comprehensive plan for development of the nation's rivers. That congressional directive was confirmed and strengthened in the Electric Consumers Protection Act of 1986. California's attempt to substitute its judgment to require a different project on Rock Creek is contrary to that directive and is preempted.

IV.

In reality, California's attempt to regulate the Rock Creek Hydroelectric Project's bypass flows is indistinguishable from the state regulations this Court struck down in *First Iowa* and *FPC v. Oregon*. In each case the state sought to require release of water from the project's dam to preserve flows in the natural streambed. In both cases the state did so for the asserted purpose, among others, of preserving sport fishing opportunities. While that is a legitimate area of state concern, the state's proper means for achieving it is to present its arguments to FERC, not to usurp FERC's role and impose its own regulation.

Nor can California do what Iowa could not by the simple expedient of labeling its regulation a "water rights" order. This case involves no water rights. The affected portion of Rock Creek is entirely on federal land and the Project has the necessary federal reserved and state riparian rights to use the water. California law recognizes no water right for preservation of instream flows for fishing purposes and, by California's own admission, no water right other than those of the respondents are affected by the Project's operation.

ARGUMENT

I. THIS COURT HAS HELD REPEATEDLY THAT THE FEDERAL POWER ACT GRANTS FERC THE EXCLUSIVE AUTHORITY TO LICENSE AND TO REGULATE HYDROPOWER PROJECTS WITHIN ITS JURISDICTION

A. The Language and Structure of the Federal Power Act Establish Comprehensive and Exclusive Federal Regulation of Hydropower Projects on Navigable Waters and on Federal Lands, While Preserving State Law Concerning Water Rights for Other Uses

In 1920 Congress passed the Federal Water Power Act, 41 Stat. 1063 (1920), which subsequently was incorporated into the Federal Power Act of 1935, 16 U.S.C. §§ 791(a)-793, 795-818, 820-820r. The Act created a federal agency, the Federal Power Commission, now known as the Federal Energy Regulatory Commission, section 1, 16 U.S.C. § 792, and charged it with responsibility for administering the Act.

The Act broadly regulates the construction and operation of hydropower projects on navigable waters and federal lands by a comprehensive licensing scheme. It empowers FERC to conduct investigations concerning the nation's water power resources and their development, section 4(a), 16 U.S.C. § 797(a) (1982), and requires that all hydropower projects on "any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States," section 23(b), 16 U.S.C. § 817 (1982), apply for and obtain a license from FERC. It explicitly sets forth a multitude of license conditions in section 10, 16 U.S.C. § 803 (1982). Primary among the mandatory license conditions is that "the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways" for beneficial public uses. *Id.* The Act further empowers

the Commission to require the modification of any project to secure such a comprehensive plan, *id.*, and to impose whatever other license conditions it deems appropriate, section 10(g), 16 U.S.C. § 803(g).

Despite this expansive licensing scheme and the broad powers the Act confers on the Commission, California argues that section 27, the Act's state-law savings provision, allows states to defeat FERC's efforts at comprehensive regulation by imposing their own, different regulations. Section 27 provides, in its entirety:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821. California and its supporters urge that this savings provision should be read in isolation from the rest of the Act, so that no state law concerning any use of water is in any way affected by the other provisions of the Federal Power Act.

Despite the state's arguments for "facial construction" based upon "plain meaning," section 27 did not have, in its historical context, the expansive "plain meaning" it suggests. Instead, section 27 was intended to preserve state-conferred vested water rights for irrigation, municipal, mining, and similar purposes from uncompensated takings, *see Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930), and to ensure continued primacy of state law respecting water uses outside FERC's jurisdiction.

The state's "plain meaning" interpretation of section 27 would render the remainder of the Federal Power Act meaningless. Pursued to its logical conclusion, this "plain meaning" argument would allow states themselves to authorize hydropower projects on navigable waters without

the federal licenses required by the Act, since "nothing" in the Act is "intend[ed] to affect or in any way interfere" with state laws concerning water use. Similarly, it would allow states to substitute their judgment for that of FERC as to what "comprehensive plan" for waterway development is appropriate. It would also allow states to veto the projects that FERC has adapted to conform to the comprehensive plan that Congress has directed FERC to develop. In short, California's position would usurp Congress's "preeminent authority to regulate the flow of navigable waters," *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982), and render both FERC and the Federal Power Act impotent.

B. This Court's *First Iowa* Decision Established the Preemptive Effect of the Federal Power Act

This Court first explored the interrelationship of the Commission's jurisdiction and state law in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). The Court there considered and rejected the contention now urged by California that section 27, in saving state laws concerning irrigation, municipal, or "other uses" of water from preemption, authorizes states to regulate the operations of federally licensed hydropower projects. A private developer proposed a project that would divert water from the Cedar River at Moscow, Iowa, transport that water by canal ten miles to Muscatine, Iowa, on the Mississippi River, and there generate electricity as the water fell 101 feet to the level of the Mississippi. 328 U.S. at 157-58. The project's diversion would leave only 25 cfs of water in the Cedar River from Moscow downstream 29 miles to the Cedar River's confluence with the Iowa River, thereby allegedly hindering navigation and harming the river's fishing.[2]

[2] *Id.* According to the State of Iowa, this diversion would result in "an absolute destruction of navigation or commerce" on the Cedar River, would "undoubtedly create a health hazard and nuisance," would "destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted," would inundate three United States highways and one state primary highway, and would make the lower portion of the Cedar River "a dry run." Brief for the State of Iowa, Intervenor at 4; Petition for Rehearing by the State of Iowa, Intervenor at 4.

When the developer sought a federal license for the project from the Federal Power Commission, Iowa intervened to oppose the application. 328 U.S. at 159. Iowa argued that the project developer had failed to comply with section 9(b) of the Federal Power Act, which requires that, to obtain a federal license, an applicant must submit

> [s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes . . . .

16 U.S.C. § 802(b) (1982). Iowa noted that the project had not, as required by section 7767 of the Iowa Code, obtained a permit from the Iowa Executive Council to construct a dam and further that it could not obtain such a permit because the project violated section 7771 of the Iowa Code, which required that "any water taken from the stream in connection with the project [must be] returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life . . . ." 328 U.S. at 165-66, 170 (emphasis omitted). Since the project had not complied with either of these state statutes, the Federal Power Commission ruled that the applicant had not presented satisfactory evidence of compliance with Iowa's laws and therefore dismissed the license application. *Id.* at 162.

This Court reversed the dismissal in an opinion which it stated "illustrate[d] the integration of federal and

state jurisdictions in licensing water power projects under the Federal Power Act." *Id.* at 156. After reviewing the legislative history, purpose, and structure of the Federal Power Act, the Court declared:

> We find that when [the Federal Power] Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. The solution reached is to apply the principle of the division of constitutional powers between the State and Federal Governments. *This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.*

Id. at 171 (emphasis added). The central theme of the opinion—that the Federal Power Act prohibits concurrent state and federal regulation over the licensing of federal hydropower projects—was reiterated numerous times:

> The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, *without setting up a divided authority over any one subject.*

Id. at 174 (emphasis added). And again:

> The detailed provisions of the Act providing for the federal plan of regulation leave no room for conflicting state controls.

Id. at 181. Thus, *First Iowa* made clear that the Act preempted all state regulation on those subjects which the Act placed under the regulatory authority of the Federal Power Commission.

The Court then addressed and rejected Iowa's contention that section 27 preserved the state's right to regulate federally licensed hydropower projects:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights.

328 U.S. at 175-76. The Court held that section 27 did not authorize Iowa's attempt to regulate the use of water by federally licensed hydropower projects, but instead related only to protection of state-conferred water rights. The case then was reversed and remanded to the Federal Power Commission [3] for consideration of the license application without regard to the requirements of sections 7767 and 7771 of the Iowa Code. *Id.* at 183.

C. *First Iowa*'s Ruling on the Scope of Section 27 Was Not Dictum

California argues that this Court may disregard *First Iowa*'s interpretation of section 27 because that case purportedly held "only that section 9(b) of the FPA does not require hydropower projects to acquire state permits as a 'condition precedent' to acquiring FERC licenses." (Pet. Br. at 6). California contends that since FERC has already licensed the Rock Creek Hydroelectric Project, *First Iowa* is inapplicable.

The argument that *First Iowa* decided only the procedural requirements of section 9(b) both trivializes the *First Iowa* decision and ignores the Court's reasoning in ruling that section 9(b) had been satisfied—reasoning premised on a determination that the Iowa requirements were preempted.

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[3] Thus, California's reliance on FPC reports from the 1920s and 1930s (Pet. Br. at 35 n.17) represents views which this Court repudiated in *First Iowa*.

Neither the parties nor the Court had any doubt that the case squarely presented the preemption issue. In First Iowa's petition for certiorari, one of the Questions Presented framed the preemption issue as follows:

> Whether, with respect to navigable waters of the United States within the State of Iowa, Chapter 363 of the Iowa Code of 1939 was superseded by the Federal Water Power Act of 1920, as amended, which became Part I of the Federal Power Act of 1935 by Title II of the Public Utility Act of 1935 (49 Stat. 838).

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 4 (question 6).[4] Or, as more succinctly stated in the State of Iowa's opposition to the petition:

> Whether the Federal Government has preempted the entire field in the enactment of the Federal Power Act to the exclusion of the provisions of the State law as contained in Chapter 363 of the Code of Iowa.

Intervenor's Resistance to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 3 (question 4); *see also* Brief for the Federal Power Commission, Respondent at 3 (question 3). The petition was granted without limitation of the questions to be reviewed, 326 U.S. 715 (1946), and, accordingly, the preemption issue was squarely presented.

As the Court noted in the opening sentence of its *First Iowa* opinion, the case was not limited to the narrow issue of the procedural requirements of section 9(b), but rather "illustrate[d] integration of federal and state jurisdictions . . . ." 328 U.S. at 156. The section 9(b) holding only reflects the Court's underlying holding that section 27 did not save the Iowa laws from preemption:

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[4] *See also id.* at 3-5 (questions 1-4, 10, and 11).

> If a state permit is not required [under section 27], there is no justification for requiring the petitioner, as a condition [under section 9(b)] of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a state permit. Compliance with state requirements that are in conflict with federal requirements may well block the federal license.

328 U.S. at 166-67. It would have made little sense to rule that state regulations were invalid under section 9(b) during the license application process if those same regulations would have prohibited the project's operation under the license once it was issued.

The specious nature of California's attempt to restrict *First Iowa*'s invalidation of state regulations to the period before issuance of a license is illustrated by the facts of *First Iowa* itself. One of the provisions of Iowa law at issue was section 7767, which forbade not only the construction, but also the maintenance and operation, of dams without a permit from the Iowa Executive Council. *See* 328 U.S. at 164. That permit could never have been issued to the *First Iowa* petitioners because of the requirement of section 7771 of the Iowa Code that any water used must be returned to the stream at the nearest practicable place. *Id.* at 165-66, 170. Thus, if *First Iowa* were limited to pre-license preemption as California urges, the case would have involved nothing more than a refusal by the Federal Power Commission to license a hydropower project that, pursuant to state law, could never have operated anyway. Such a case would have involved neither an abuse of discretion warranting reversal of the Commission nor an "important question of federal law" warranting the discretionary review given by the Court.

D. *Federal Power Commission v. Oregon*

This Court reaffirmed *First Iowa*'s construction of section 27 nine years later, when it was applied to a project

which, like the Rock Creek Project, was located on a nonnavigable stream on federal land. In that case, *FPC v. Oregon*, 349 U.S. 435, 437-38 (1955), Oregon challenged the Federal Power Commission's issuance of a license to a private developer for construction of a hydropower project on the Deschutes River in Oregon. Oregon contended that the license conditions did not provide adequate protection for breeding fish. *Id.* at 437. Relying on *First Iowa*, the Court again found exclusive federal authority to regulate federally licensed hydropower projects, saving state law from preemption only to the extent necessary to protect vested water rights of others. *Id.* at 441-46. In the Court's view, there was

> no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others.

Id. at 444-45 (citing section 27). In reliance upon *First Iowa*'s construction of section 27 and *without even a citation to section 9(b)*, the Court invalidated Oregon's attempt to impose its own fishery protection measures on the project's operation:

> To allow Oregon to veto such use [of water by the project], by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision. No such duplication of authority is called for by the Act.

349 U.S. at 445 (citations to *First Iowa* omitted). Thus, in *FPC v. Oregon* this Court squarely interpreted *First Iowa* to preclude states from relying on section 27 to impose fish protection measures on federally licensed projects located on federal land.[5]

[5] *See* brief filed in this case by the Modesto Irrigation District and the Turlock Irrigation District, as *amici curiae*, Part IIC.

E. The Courts and Private Licensees Have Relied Upon *First Iowa* for More Than Forty Years

The interpretation of the Federal Power Act first announced by this Court in *First Iowa* has been uniformly followed in the ensuing years. Courts, the Commission, and hydropower project operators all have proceeded on the basis that the Commission's requirements as to project operation are authoritative. Indeed, the *First Iowa* rule has given rise to a well developed regulatory scheme under which hundreds of projects have been constructed.[6]

Consistent with authority in this Court since 1946,[7] lower court adherence to the *First Iowa* rule has been frequent, long-continued and uniform. Thus, in *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165, 176 (9th Cir. 1964), the Ninth Circuit held that section 27 is limited to preserving a right to compensation where state-conferred rights are taken by a licensee under the Federal Power Act.[8] The Second Circuit has followed suit.[9] District courts also have followed

[6] *See, e.g., amici curiae* brief filed in this case by Pacific Northwest Utilities, *passim*, for a discussion of more than one hundred hydroelectric projects that are operated as a coordinated interstate and international system in the Pacific northwest.

[7] *See, e.g., Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 334-39 n.6 (1982).

[8] *See also Public Util. Dist. No. 1 v. City of Seattle*, 382 F.2d 666, 670 n.6 (9th Cir. 1967), *cert. dismissed*, 396 U.S. 803 (1969); *Washington Dept. of Game v. Federal Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954); *United States v. Central Stockholders' Corp.*, 52 F.2d 322, 330-32 (9th Cir. 1931) (section 21 of the Federal Power Act, 16 U.S.C. § 814, gives licensees the power of condemnation).

[9] *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463, 478 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *see also Board of Elec. Light Comm'rs of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983).

First Iowa's lead. *See, e.g., Mega Renewables v. County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986); *Town of Springfield, Vt. v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Town of Springfield, Vt. v. Vermont Env'tl Bd.*, 521 F. Supp. 243, 248-49 (D. Vt. 1981). Thus the Ninth Circuit's decision in this case is clearly in accord with settled law and the expectations of federal licensees under the Act.

II. THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT OF 1920 SUPPORTS THE DECISION OF THE COURT OF APPEALS

Relying on snippets of floor debates concerning water power bills never enacted and on admittedly antique notions as to the power of the federal government under the Constitution,[10] California creates a legislative "history" that is wholly at odds with historical fact.[11] According to California, the framers of the Federal Water Power Act, after more than a decade of effort to enact federal water power legislation, happily "deferred" to state regulation of water use as the answer to the need for comprehensive regional planning for the development of the new energy source.

The actual course of history was precisely the opposite. Congress did *not* decide in the Federal Water Power Act to "defer" to state regulation of water power. Instead,

[10] Under this Court's contemporary decisions, the power of Congress to preempt state regulation of development of hydroelectric power on federal lands is beyond question. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976). California's brief at times appears to concede this, but at other times implies to the contrary. (Pet. Br. at 18-22).

[11] The same arguments from legislative history that California makes here were raised, but rejected, by this Court in *First Iowa*, as the *amici curiae* brief of the Modesto and Turlock Irrigation Districts demonstrates in detail.

after years of debate in which the "states' rights" arguments California makes here were advanced again and again in the political arena, Congress *deliberately rejected* a policy of deference *in favor of a scheme of comprehensive federal regulation in which state regulators were to take a primarily advisory and consultative role.* That Congress so chose is manifest throughout the legislative history of the bill actually enacted—H.R. 3184, 66th Cong., 2d Sess. (1920). It is equally obvious when prior legislative efforts are considered. The "legislative history" California presents here is taken out of context from start to finish in an effort to have this Court decide policy issues resolved on the floors of Congress seventy years ago.

A. The Legislative History of H.R. 3184 Confirms the Primacy of Federal Regulation of Water Power Development

As this Court stated in *First Iowa*, the purpose of the Federal Water Power Act was common knowledge at the time of its enactment: to create a "complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of . . . other federal laws previously enacted." 328 U.S. at 180. Hoping that time has erased this collective memory, California culls question-begging remarks about state "water rights laws" from floor debates occurring during four different terms of Congress and concerning (counting House and Senate versions separately) essentially six different bills.[12]

[12] California's treatment of the legislative history is particularly flawed with respect to H.R. 16673, 63rd Cong., 3d Sess. (1914). The legislators California quotes—representatives Mondell and Taylor—did not even support passage of H.R. 16673, because they believed it intruded improperly on the rights of the states. 51 Cong. Rec. 13630, 13680 (1914).

California's presentation obscures the fact that the legislative history of H.R. 3184, the bill actually enacted, abounds with statements from supporters and detractors alike acknowledging or asserting that the bill created a scheme of national, rather than local, regulation of water power development. Indeed, the reports of both houses of Congress regarding H.R. 3184 expressly emphasize that the problems addressed by the bill were *national* in scope, requiring a regulatory scheme that operated at the *federal* level:

> 'The bill . . . provides that the administration of water powers within Federal jurisdiction . . . be directed toward a *constructive national program of intelligent, economical utilization of our power resources.* To accomplish this purpose it gives the commission sufficient organization and authority to enable it to undertake, in cooperation with other agencies, the fundamental studies and investigations upon which such a program must be founded if it is to be effective. *The problems are national, rather than local; they transcend State lines, and can not be handled adequately except by or in conjunction with national agencies.*'

H. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919) (quoting Secretary of Agriculture D. F. Houston) (emphasis added); S. Rep. No. 180, 66th Cong., 1st Sess. 5-6 (1919) (incorporating House report). Hearing testimony was to the same effect:

> On account of the extent of the territory which will be involved and of the fact that the power transmission system must ignore State lines, no authority less than the Federal Government will have sufficient jurisdiction either to conduct the investigations or to exercise control over the completed systems.

Water Power: Hearings Before the Committee on Water Power, 65th Cong., 2d Sess. (1918) (statement of Administration spokesman O.C. Merrill, at 9).

Moreover, throughout the floor debates, Congress was made fully aware that its goal of regulating at the national level was to be achieved by a commission holding final decisionmaking authority. Representative Gordon Lee, a Floor Manager and member of the House Committee on Water Power,[13] described the main points of the bill as follows:

> *No development [of water power rights] can be made by any agency other than the United States itself, except under the authority of and in accordance with the provisions of a license issued by the commission.* . . . Existing laws which provide for a different disposition of water-power rights are to be repealed.

59 Cong. Rec. 6527 (1920) (emphasis added).[14] In other words, a state agency could not, as here, substitute its own judgment for that of the Commission with respect to issues addressed and resolved by the latter in accordance with the Act's provision for "comprehensive" fed-

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[13] The views of floor managers and committee members are generally assumed to have been adopted by Congress absent evidence to the contrary. *See, e.g., National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 639-40 (1967).

[14] Representative John Esch, a House Floor Manager and Chairman of the House Committee on Water Power, was equally blunt that the Commission's judgment is not to be second guessed:

> Mr. HULINGS. Mr. Chairman . . . I remember . . . there was a great deal of complaint [that] the handling of the public lands in the West by the Secretary of the Interior . . . was arrogant . . . injudicious . . . unwise . . . [and] partisan. . . . Are [the commissioners] to have unlimited control of the licensing of these water rights, without any right of appeal to any other authority?
>
> Mr. ESCH. Subject to the provisions and limitations of the act. Of course, if officials of the Government violate an act, there is a remedy . . . in the courts. . . . *But there is no appeal from the decision of the commission on any matter that is within the jurisdiction of the commission under this act.*

58 Cong. Rec. 2026-27 (1919) (emphasis added).

eral regulation. Such issues committed to the Commission were understood to include whether, and on what conditions, water could be used for power purposes:

> This is a power bill and grants rights for power. Now, if a party appropriates water under State law . . . they will have that additional property right in addition to the power privilege granted here; *but this bill is for the purpose . . . of giving authority to create power and utilize water for power purposes.*

Hearings, *supra*, at 92 (1918) (remarks of Representative Taylor) (emphasis added).

The comments of critics and opponents of the bill are equally revealing. They show that Congress considered, *but rejected*, the same constitutional contentions and parochial approach that California evidently believes shaped, or should have shaped, the Act. One of the more impassioned such critics was Senator King:

> It had been my purpose to do everything within my power in a parliamentary way to defeat the conference report. The general theory of the bill is in contravention of the rights of the States, and many of its provisions are so hateful and oppressive . . . that I regard its passage as a great calamity. Unfortunately the views which I entertain respecting this measure are not shared by many members of the legislative branch of the government . . . .
>
> . . . Notwithstanding there is no plenary or other power in the Federal Government to exercise any control over the streams of the United States, except to prevent interference with their navigation, this bill seeks the control of all sources of hydraulic power in the United States as well as the control of all streams therein.

59 Cong. Rec. 7778-79 (1920).

In short, it is plain that Congress knew what it was doing in 1920 when it adopted the language that, as *First Iowa* held, commits comprehensive, and final, regulatory authority to federal, and not state, regulators. Necessarily, Congress also realized that a scheme of this nature would preempt state law and state regulation. Indeed, when it was suggested in committee hearings that the bill be amended to require proof that the license applicant had in fact "obtained the consent of the duly constituted authorities of the State" to the water power project proposed, the suggestion was rejected after Representative Raker of California objected that it "would practically change the fundamental principle of this bill," because "the whole scheme would be subject to the regulation and control, in effect, of the State." Hearings, *supra*, at 364 (1918).

B. History Refutes California's Contention that the Federal Water Power Act Continued a Congressional Tradition of Deference to State Water Law

California assets that in enacting the Federal Water Power Act, Congress must be presumed to have followed a traditional "policy of 'purposeful and continued deference to state water law.'" (Pet. Br. at 18) (quoting *California v. United States*, 438 U.S. at 653). Even granting that there was such a traditional policy, however, California's argument that Congress followed that tradition in drafting the Federal Water Power Act is simply untrue as an historical matter.

It is true that during the many years in which federal water power legislation was debated, some members of Congress believed that the states "owned" all intrastate waters or that the federal government constitutionally could not regulate water power. These congressmen allied themselves with colleagues from western states, who opposed the federal government's continued ownership of vast stretches of nontaxable public lands, and with others who simply opposed nonlocal regulation of any sort. The alliance, which opposed federal regulation though desir-

ing to facilitate development of water power, was indeed powerful, but it was not controlling: it was opposed by an equally strong and determined faction which believed that comprehensive regulation of water power development was both constitutional [15] and desirable.[16]

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[15] *See, e.g.*, H. Rep. No. 16, 64th Cong., 1st Sess. 11-12 (1916) ("Much opposition to [reserving title to water power sites on federal lands] has arisen in the West, those opposed asserting that inasmuch as the water belongs to the States that the mere fact that the Federal Government owns the sites does not warrant the Government in holding them and seeking to generally control and regulate the projects. [¶] Your committee could not follow this contention, believing it to be the duty of the Federal Government where the Government owns the site to properly use it, to properly aid in its development, but at all times to fully retain control and properly regulate in the public interest"). *See also* 53 Cong. Rec. 547, 549, 550 (1916) (remarks of representatives Ferris and Lenroot to the same effect). With regard to the constitutional argument advanced in favor of regulation of water power development on navigable waters, *see, e.g.*, 59 Cong. Rec. 1100 (1920) (remarks of Senator Lenroot).

[16] These congressmen believed that regulation should occur at the federal level in order to address problems of interstate monopoly, *and to coordinate rationally the development of natural resources on a regional basis.* They were trust-busters and conservationists, and Theodore Roosevelt was their mentor. *See* 43 Cong. Rec. 978 (1909) (message from President Roosevelt) ("the great corporations are acting with foresight, singleness of purpose and vigor to control the water powers of the country. They pay no attention to state boundaries, and are not interested in the Constitutional law affecting navigable streams, except as it affords what has been aptly called a 'twilight zone' where they may find a convenient refuge from any regulation"); 42 Cong. Rec. 6966 (1908) (letter from Roosevelt to members of the Inland Waterways Commission) ("works designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to these and similar uses of water must be respected, *the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all of the uses to which*

For years, the opposing sides blocked enactment of water power bills. The bills cited by California—H.R. 16673 and H.R. 408—together with a number of others, were introduced, extensively debated, and then voted down. The conservationists controlled the House, while the states' rights advocates had considerable strength in the Senate. During the stalemate, virtually all water power development on federal lands and navigable waters stopped.[17]

Ultimately, however, the advocates of federal regulation prevailed. The Western states were anxious to develop their vast water power resources, which were located largely on public lands lying within their borders. This desire became more pressing after an energy shortage brought about by World War I. After their long fight, the Westerners despaired of ever seeing control of the

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streams may be put, and should bring together and coordinate the points of view of all users of waters"). *See also* 53 Cong. Rec. 530 (1916) (remarks of Representative Ferris); H. Rep. No. 16, 64th Cong., 1st Sess. (1916).

[17] The impediments were both legal and practical. Initial regulatory efforts by the federal government over waterways, aimed at policing obstructions to navigation, required Congressional approval for construction of water projects on navigable waters. Rivers and Harbors Act of 1884, 23 Stat. 133; Rivers and Harbors Act of September 19, 1890, 26 Stat. 426; Act of 1899, 30 Stat. 1121. President Roosevelt, however, announced that he would veto any special legislation directed at developing water power until strict federal controls were enacted. 42 Cong. Rec. 4698 (1908). After he made good his threat a number of times, water power interests stopped trying. Meanwhile, the Secretary of the Interior was taking an equally stern stand against uncontrolled development of water power sites on public lands, *see, e.g.*, 51 Cong. Rec. 13630 (1914) (remarks of Representative Mondell), over which he had authority under a 1901 Act (31 Stat. 790 (1901)) to grant rights of way. Because the Secretary's permits were revocable, water power companies decided not to risk their capital on development of public lands sites.

For general discussions of these events, including the delay in development of water power, *see* G. Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945); H. Rep. No. 61, 66th Cong., 1st Sess. 2-5 (1919).

water power sites pass to the states, and their disappointment was eased somewhat by provisions in the Federal Water Power Act that they would share in the licensing fees collected by the federal government. The Federal Water Power Act became law.

Thus, California's contention that Congress in enacting the Federal Water Power Act simply assumed that the Act would follow a tradition of federal deference to state regulation is not tenable. The quotations California presents are only one side—and the losing side—of a bitterly fought jurisdictional battle in which the positions taken were deliberate and explicit, not implied or automatic. That this battle occurred, and that it was resolved in favor of federal regulation, is evident from a review of the legislative reports on the bills introduced by the two factions [18] and, from a comparison of the Federal Water Power Act with the objections contained in the minority reports. It is also evident from examination of the terms of other bills, drafted by the states'

[18] The Senate versions of H.R. 408 and H.R. 16673 contain the following language: "No lease shall be granted until the applicant has the right from the State or States wherever such a project is to be located to sufficient water to develop or generate the electrical energy intended to be generated by the applicant's proposed project." S. Rep. No. 66, 64th Cong., 1st Sess. 1 (1916). Those unenacted bills also permitted, upon approval by the State involved, entry by any person onto the public land leased by the United States for water power development for purposes of using that land for impounding and conveying waters for irrigation or other purposes. *Id.* at 4. The bills stripped the federal regulator—in this version, the Secretary of the Interior—of almost all discretion, "directing" him to issue licenses in accordance with "general regulations" rather than permitting him to impose conditions case-by-case. S. Rep. No. 898, 63d Cong., 3d Sess. 3 (1915). The House bills contained none of these terms.

See also the minority reports filed by states' rights advocates to accompany S. Rep. No. 898, 63d Cong., 3d Sess. (1915) (pertaining to H.R. 16673) and S. Rep. No. 66, 64th Cong., 1st Sess. (1916) (pertaining to H.R. 408).

rights faction, that never emerged from committee.[19] Clearly, Congress was well aware of its alternatives, but ultimately chose a scheme of comprehensive regulation operating at the federal level.

C. The Legislative History of the Federal Water Power Act Fails to Support California's Construction of Section 27 of the Act

Even though it largely pertains to bills never enacted, the extended legislative history on which California relies in its brief does illuminate the meaning of section 27 of the Federal Water Power Act, although not in the way California intends.

First, Congress's use of the same saving clause in bills with such divergent approaches (*see supra*, n.18) supports respondents' position that the clause's meaning can be gleaned only from its context in the particular piece of legislation as a whole. In these circumstances, parsing of the language of the clause *in vaccuc* is unlikely to be meaningful.

Second, while arguing for the broadest possible reading of section 27, the states' rights advocates who kept inserting it in the various water power bills that California cites *admitted repeatedly* that if the clause were read to encompass all of their misgivings about the respective roles of the state and federal governments under those bills, it would conflict with virtually every other substantive provision being proposed. *See* S. Rep. No. 66, 64th Cong., 1st Sess. 15 (1916) (minority report at 15); 51 Cong. Rec. 13631 (1914) (remarks of Representative

[19] *See, e.g.*, S. 7432, 61st Cong., 2d Sess (1910) (authorizing the President to withdraw from "all forms of settlement, entry, or other disposition any lands which are or may become chiefly valuable for the development of water power, and providing for the acquisition, by any State . . . under certain conditions, of any lands so withdrawn"). *See also* 53 Cong. Rec. 558 (1916) (advocating a right of way bill for power development which would provide that every permit would be conditioned on the state's right to supervise and control the project) (remarks of Representative Mondell).

Mondell); 51 Cong. Rec. 14070 (1914) (Representative Mondell); 53 Cong. Rec. 740 (1916) (Representative Mondell).[20] The only possible conclusion is that the view those advocates propounded—one which reserved final regulatory authority to the states—was not shared by their colleagues.

Third, the legislative history makes clear that the real role intended by Congress in the enactment of section 27 was the preservation of existing allocations of water to irrigation (and, to a lesser extent, municipal, mining, and domestic) uses. As stated by Representative Taylor of Colorado:

> Mr. Chairman, if the gentleman does not want to deliberately take away the vested rights of the Western States to the waters which our people own and are now using for irrigation of their growing crops, he would not offer this kind of an amendment [to strike the savings clause] . . . .
>
> Practically every drop of the natural flow of the waters of every stream in every Western State to-day is appropriated and being beneficially used. . . .
>
> *We are not objecting to its being used for power purposes. It does not diminish the water as it falls down the mountainside and turns a wheel. But if you permit these power companies to take the water out of that stream and divert it from its use for irrigation and disregard the irrigators' rights, you simply destroy the vested rights of 40 years in the West.*

51 Cong. Rec. 14067 (1914).

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[20] Indeed, in Representative Mondell's remarks (some of which are quoted at length in the *amici curiae* brief of Pacific Gas and Electric Company, Southern California Edison Company, and Utah Power & Light Company in this case), this proponent of states' rights admitted that the language of section 27 is not as broad as that of section 8 of the Reclamation Act, and suggested that "power" be added to the list of "uses" reserved for state regulation under section 27. The suggestion was not adopted.

This was the tenor of the remarks offered when congressmen inquired as to the meaning of section 27.[21] Significantly, the "uses" described are *consumptive* or *proprietary*. No mention was made—and California cites none—of any intention to reserve to the states authority to impose their own views as to the relative priority of public interests in, on the one hand, development of hydropower capabilities, and, on the other, the protection of fisheries existing on public lands. No example that is even remotely analogous was offered. Instead, Congress's reading of section 27 was concrete and limited, bounded by Representative Taylor's explanation of the problems the clause was designed to address. While the language of section 27 read in isolation may be overbroad in expressing Congress's intent, little more can be expected of a savings clause that was, to repeat, inserted indiscriminately in a wide variety of bills.[22]

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[21] *See also, e.g.*, 59 Cong. Rec. 1041 (1919) ("So far as irrigation is concerned, and so far as the use of water for domestic purposes is concerned, the bill saves to the States all rights that they have under their State legislation") (remarks of Senator Nelson); 59 Cong. Rec. 245 (1919) ("The bill expressly provides that nothing contained therein shall affect or interfere with the laws of the respective States relating to the control of or use of water used for irrigation or for municipal purposes") (Senator Jones); 56 Cong. Rec. 9115 (1918) (describing section 27 as "the savings clause of our irrigation right") (Representative Taylor).

[22] *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (where the plain meaning of a provision is completely at variance with the purpose of the statute, as revealed by legislative history and the historical context in which the legislation was enacted, the plain meaning should be disregarded); *Cass v. United States*, 417 U.S. 72, 83 (1974) ("in resolving ambiguity, we must allow ourselves some recognition of sheer inadvertance in the legislative process"); *Zambardino v. Schweiker*, 668 F.2d 194 (3d Cir. 1981) (to the same effect; rejecting plain meaning as contrary to intent of Congress as revealed by legislative history); *J.C. Penney Co. v. Comm'r*, 312 F.2d 65 (2d Cir. 1962) (refusing to construe language that was originally surplusage as imbued with meaning following an amendment, because plain meaning of amended lan-

The legislative history does not support California's argument regarding section 27—an argument that, in essence, construes the unrevealing language of the clause to undo all that the Federal Water Power Act otherwise provides. The debates show instead that Congress meant nothing more ingenious or imaginative than that irrigators, towns, and mines could continue to use water that had already been promised to or held by them. The Court should so construe it.

D. The Language and Legislative History of the Electric Consumers Protection Act Confirm the Final Authority of FERC Under the Federal Power Act to Reconcile Competing Public Interests Affected by Water Power Projects

For over forty years, Congress has refrained from legislatively overturning *First Iowa* and its progeny, thus plainly evidencing satisfaction with the correctness of this Court's holdings in those cases. The several cases, of long standing, should not be simply brushed aside on the vacuous ground that they are simply "dicta." *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2371-72 n.1 (1989); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).[23] But even if an affirmative congressional endorsement of the Court's rulings were necessary, Congress's enactment in 1986 of the Electric Consumers Protection Act ("ECPA"), which amends the Federal Power Act, clearly confirmed the understanding of the legislative branch that FERC has the ultimate authority for reconciling the competing public interests—including, expressly, those involving protection of fish and wildlife—that are affected by hydropower development.

ECPA explicitly recognizes "adequate protection [of], mitigation [of damages to], and enhancement of fish

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guage would conflict with congressional intent as evidenced by legislative history).

[23] *See generally* Address by L. Powell, Jr., "*Stare Decisis* and Judicial Restraint," printed in the Record of the Association of the Bar of the City of New York, Vol. 44, No. 8 (Dec., 1989).

and wildlife (including related spawning grounds and habitat)" as numbering among the values which FERC must weigh in formulating its comprehensive plans under the Federal Power Act for development of the nation's waterways. 16 U.S.C. § 803(a)(1). Indeed, ECPA provides that FERC must give "equal consideration" to these fish and wildlife concerns. 16 U.S.C. § 797(e). Even more importantly, ECPA provides that FERC must also consider the "extent to which the project is consistent with a comprehensive plan . . . for improving, developing, or conserving a waterway . . . . affected by the project that is prepared by . . . (ii) the State in which the facility is or will be located." 16 U.S.C. § 803(a)(2)(A). Finally, ECPA added subsection (j) to section 10 of the Federal Power Act, thereby creating a procedure by which FERC must either include in each license any conditions recommended by the applicable state fish and wildlife agency, or publish formal findings explaining why those recommendations are inconsistent with law. 16 U.S.C. 803(j). Thus, by enacting ECPA, Congress enhanced the advisory role given to state agencies within FERC proceedings, while retaining FERC as the ultimate decisionmaker.

The legislative history of ECPA confirms the understanding of Congress that FERC is the ultimate decisionmaker under the Federal Power Act with respect to the impact of hydropower projects on fish. The House report on the ECPA legislation states that while ECPA "clearly and unmistakeably upgrades the status at FERC of recommendations of . . . the applicable State fish and wildlife agencies . . . . [t]heir role *is not a veto over a project.*" H. Rep. No. 507, 99th Cong., 2d Sess. 22 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2509 (emphasis added). *See also* H. Conf. Rep. No. 934, 99th Cong., 2d Sess. 22-25 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2538-2542 (section 10(j), added by ECPA, "does not give [state] agencies a veto, nor does it give them mandatory authority, such as provided in section 30(c) of the Federal

Power Act. . . . FERC is empowered to decide license terms and conditions").[24]

The enactment of ECPA shows that Congress recognizes the primacy of FERC in licensing decisions, that it approves of this Court's construction of the Federal Power Act, and that it does not intend that state agencies have more than an advisory role—admittedly an important advisory role, but advisory nonetheless—in weighing the effects on fish and fish habitats of proposed or operating hydropower projects. Even if the language and structure of the Federal Power Act as it existed prior to 1986 were not clear on these points, the enactment of ECPA should resolve any doubt.

III. *FIRST IOWA* AND *FEDERAL POWER COMMISSION v. OREGON* ARE NEITHER OVERRULED BY NOR INCONSISTENT WITH *CALIFORNIA v. UNITED STATES*

In tacit recognition of the full significance of *First Iowa*, California argues that the decision should not apply here because *First Iowa* was silently overruled by *California v. United States*, 438 U.S. 645 (1978). *California* held that under section 8 of the Reclamation Act of

[24] In considering these comments, it is important to note that ECPA was directed not at changing the basic structure of the Federal Power Act from a scheme of primarily federal, to a scheme of primarily state, regulation. *See* H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 23 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2539 ("this amendment does not change . . . the present duties of FERC . . . under Sections 4, 10(a), and 18 of the Federal Power Act"). Instead, the 99th Congress in general expressly approved of the terms and judicial interpretations of the Act, H. Rep. No. 507, 99th Cong., 2d Sess. 11, 12, 21, 31 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2498-2500, 2507, 2518, but directed the ECPA amendments at guiding FERC's discretion so that the agency would not give short shrift to non-power concerns. *Id.* at 17, [1986] U.S. Code Cong. & Admin News at 2563-64.

1902,[25] states may impose conditions on "control, appropriation, use, or distribution of water" in federal reclamation projects, to the extent the conditions are not inconsistent with congressional directives. The petitioner contends here that "[s]ince *California* holds that section 8 requires federal reclamation projects to comply with state regulatory water laws, and since section 27 [of the Federal Power Act] was modeled after section 8 [of the Reclamation Act], section 27 similarly requires hydropower projects to comply with such state laws." (Pet. Br. at 14).

California, however, involved the preemptive effect of a different statute having a markedly different purpose and structure and a savings provision having substantially different wording. The preemption ruling in *First Iowa*, moreover, is completely consistent with the *California* rationale, which requires preemption of state laws that are inconsistent with congressional directives. Section 10(a) of the Federal Power Act is just such a directive: it gives FERC exclusive responsibility for adapting projects so that they best advance the comprehensive development of the nation's waterways. California's attempt to overrule that adaptation and require different project operating conditions is inconsistent with the congressional directive and thus is preempted.

A. *California v. United States*

California v. United States arose from a controversy between the United States Bureau of Reclamation and California's Water Board concerning construction and operation by the Bureau of the New Melones Dam. 438 U.S. at 651. The Bureau had applied to the Water Board for a permit to appropriate the water that would be impounded behind the dam and later used for reclamation of arid lands. *Id.* at 652. Although the Water Board approved the application, it attached 25 conditions to the

[25] 43 U.S.C. §§ 372, 383.

permit. *Id.* The United States then obtained a declaratory judgment from the federal district court that the United States could impound whatever unappropriated water was necessary for its federal reclamation project without complying with conditions imposed under state law. *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975), *aff'd*, 558 F.2d 1347 (9th Cir. 1977).

This Court reversed, invoking the savings clause of section 8 of the Reclamation Act. 43 U.S.C. § 383. Rather than taking a plain meaning approach to section 8, the Court looked to the Reclamation Act's legislative history, which showed that, while Congress intended the federal government to fund reclamation projects, the projects were to be operated in conformity with state law, except as provided in any "explicit congressional directive[s]." 438 U.S. at 673. The Court concluded that California's Water Board could impose conditions on the New Melones Project's permit to appropriate water, so long as those conditions were not actually in conflict with congressional directives regarding the project. 438 U.S. at 670-79.

B. The Differences in Structure and Purpose of the Reclamation Act and the Federal Power Act Require Different Interpretations of Their Preemption Provisions

In this case, California argues that section 8 of the Reclamation Act and section 27 of the Federal Power Act must be interpreted identically, since some of the language contained in section 8 appears in section 27 as well. (Pet. Br. at 14). The argument, however, ignores the fundamentally different statutory schemes to which the savings clauses pertain, and crucial textual differences that exist within those clauses themselves. Those differences require that *California's* broad reading of section 8 of the Reclamation Act not be grafted onto the Federal Power Act.

Indeed, in its briefing to this Court in *California v. United States*, California did not attack *First Iowa's* construction of section 27, but instead acknowledged that state "veto power" over the construction and operation of FERC-licensed hydropower projects would be inconsistent with the Federal Power Act:

> The Court [in *First Iowa*] properly rejected Iowa's argument, ruling that the federal government has exclusive authority to license the construction and operation of such projects . . . . This Court properly refrained from relying on *First Iowa* in its subsequent consideration of section 8 in *Ivanhoe* and *Fresno*, and should also refrain from doing so here.

Reply Brief for the Petitioners, *California*, at 17. The Court should similarly recognize in this case that, in view of the differences in statutory schemes and language, *California* does not require that section 27's interpretation be lock-stepped with section 8.

The Reclamation Act was designated principally to provide federal funding for irrigation projects in the arid West. *See California v. United States*, 438 U.S. at 664. Rather than imposing a broad scheme of regulation by the federal government, the Reclamation Act "merely authorize[s] the expenditure of funds in States whose citizens [are] generally anxious to have them expended . . . ." *California v. United States*, 438 U.S. at 651. The Reclamation Act, indeed, is so deferential to state law that its savings clause expressly preserves state laws relating to irrigation, the *central purpose* of the Act itself.[26] This deferential scheme implicitly recognizes that irrigation is a matter of exclusively local concern, and that regulation of it at the state level is, if not essential, eminently appropriate.

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[26] Thus, section 8 provides, in pertinent part, that nothing in the Act is intended to affect states' laws with respect to "the control, appropriation, use, or distribution of water *used in irrigation*." (Emphasis added.)

In contrast, the Federal Power Act was designed "to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so . . .," *First Iowa*, 328 U.S. at 180, and not merely to provide funding. To achieve its purposes, the Federal Power Act employs the efforts of thousands of licensees under supervision of a federal agency and gives that agency broad authority pervasively to regulate the construction and operation of hydropower projects. Furthermore, in contrast to the Reclamation Act's section 8, the Federal Power Act's savings clause does not purport to preserve state laws concerning the very purpose (hydropower development) of the entire statute. As this Court noted in *First Iowa*, if Congress had intended to subordinate the Federal Power Act's comprehensive regulation of hydropower projects to state laws concerning use of water by such projects, "the simple thing would have been to so provide." 328 U.S. at 178-79.

But the dissimilarity between section 8 and section 27 does not end with the substantial differences between the statutory schemes and purposes: the clauses are not even identical textually. While section 27 of the Federal Power Act may have been, as California repeatedly asserts, "modelled" upon section 8 of the Reclamation Act of 1902, fully half of the language in section 8 [italicized, below] has no analog in the Federal Power Act whatever. Section 8 provides as follows, in pertinent part:

> [N]othing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, *and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of*

> *the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof . . .*

(emphasis added). It is readily apparent that in "modelling" section 27 after section 8, Congress *chose not* to include any requirement that FERC "proceed in conformity" with state law.[27] The reason is obvious: the plain meaning of the italicized language is to subordinate federal regulation under the Reclamation Act to state law. In enacting the Federal Power Act, however, Congress did not intend to defer, but simply to provide for the continued effect of state laws involving matters of purely local concern, such as irrigation. The Federal Power Act is not the Reclamation Act, and Congress's use of similar language in a single independent clause in both Acts does not mandate otherwise.

Differing constructions in different contexts of water law savings clauses is neither novel nor anomalous. Instead, it is a longstanding and well-accepted phenomenon that reflects the fact that savings provisions are used in different acts with markedly different purposes. For instance, twelve years before *First Iowa*, the Court interpreted the Desert Land Act's savings provision[28] as having a broad effect in saving state water laws from preemption. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155-58 (1935). In *First Iowa*, this Court gave section 27 of the Federal Power Act a narrow construction without citing *California Oregon*. Thirty-two years later, in *California v. United States*, the Court gave section 8 of the Reclamation Act a broad construction without citing *First Iowa*. Thus, rather than creating an anomaly, the different constructions of sections 8 and 27 are simply illustrative

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[27] This significant difference in language between section 8 and section 27 was noted by California in its Reply Brief in *California v. United States*, at 16 n.3.

[28] Desert Land Act of 1877, § 1, 19 Stat. 377, 43 U.S.C. § 321.

of similar language interpreted differently when given different statutory qualifiers and when used in different contexts. If section 8 of the Reclamation Act had a "plain meaning" that could be interpolated into the Federal Power Act, the Court would surely have announced that meaning in *California*. That it instead construed that clause in the context of the Reclamation Act's history and structure only confirms that the same approach should be taken here.

C. *California v. United States* Is Entirely Consistent With the Decisions Below, Since the Federal Power Act Is a Statutory Directive Preempting State Regulation of Federally Licensed Hydropower Projects

Moreover, and quite apart from textual and structural differences between the Federal Power Act and the Reclamation Act, *First Iowa* is fully consistent with the rationale in *California v. United States* that state water laws remain intact only to the extent they do not conflict with "explicit congressional directives." 438 U.S. at 672-74. California's attempt dramatically to pare back the Rock Creek Project clashes with the requirements of the Federal Power Act and thus conflicts with clear "congressional directives." [29]

At the time the Commission granted the Rock Creek license, section 10(a) of the Federal Power Act provided:

> That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment

[29] On remand from *California v. United States*, the Ninth Circuit rejected California's broad contention that only "explicit federal statutory policies" constitute "congressional directives" that displace state law, *United States v. California*, 694 F.2d 1171, 1176 (9th Cir. 1982) (Kennedy, J.), instead holding that state regulations are preempted where they "clash[] with express or clearly implied congressional intent or work[] at cross-purposes with an important federal interest served by the congressional scheme." *Id.*, at 1177. Under this test, the New Melones conditions were upheld.

> of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. § 803(a) (1982).[30] Thus, section 10(a) both commands that the Commission "adapt" licensed hydropower projects to best suit "beneficial public uses" and delegates to "the judgment of the Commission" the determination of what best suits those uses. Furthermore, FERC is responsible, pursuant to its comprehensive planning responsibilities, for regulating the manner in which the Project operates. In determining what bypass flows to establish to promote its overall plan, FERC considered the needs for both power production and fishery resource protection. After considering the views presented and evidence submitted by both the Partnership and California, FERC struck a balance between those needs. That balance establishes a year-round bypass flow of 20 cfs. *See generally* Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,117-18 (1987) (reprinted in the Appendix hereto).

To permit California to impose its own regulations upon a hydropower project, licensed by FERC in accordance with the Federal Power Act's statutory authorization, is to permit states to supersede the "congressional directive" that FERC is to exercise its judgment as to which projects will best promote the beneficial public uses of the nation's water resources and how those projects should be operated. Fishery is but one of the public interests that FERC is required to balance in reaching its licensing decisions. To say, as California does, that that

[30] As previously noted, this section was amended in 1986 by ECPA explicitly to require consideration by FERC of fish and fish habitats.

interest is subject to reevaluation by a dissenting state agency is to say that all public interests are similarly subject. Such a reading would make a shambles of FERC's decisionmaking process and put hydropower projects at grave risk, impeding or even halting entirely the private investments Congress was anxious to encourage in enacting the Federal Power Act.

Moreover, that there is here a "statutory directive" requiring preemption is evident upon consideration of the legal dilemma with which the Partnership is faced under the Federal Power Act if it complies with California's regulation of bypass flows. California, through its Water Board, has ordered the Partnership to bypass 30 and 60 cfs; FERC has ordered that the Partnership comply with the lower, FERC-established flows, "irrespective of any action taken by [the Water Board]." FERC March 11, 1987 Order, 38 F.E.R.C. at 61,773. (Pet. App. 18) Under section 13 of the Federal Power Act, 16 U.S.C. § 806, the Partnership, having accepted the FERC License, is required to operate the Project "as [FERC] shall deem necessary to supply the reasonable needs of the then available market"; if it violates the terms and conditions of its License, the provisions of the Act or any FERC order, it is subject to license revocation or injunctive proceedings under section 26 of the Federal Power Act, 16 U.S.C. § 820, and risks substantial fines under section 31(c) of ECPA, 16 U.S.C. § 823b(c). Thus, by imposing bypass flows on the Project different than those established in the FERC License, California has imposed duplicative regulations on the Project which not only disrupt FERC's comprehensive planning, but also threaten to shut down the Project altogether. FERC's licensing decisions, issued pursuant to its delegated authority under the Act, constitute directives which clearly distinguish this case from the facts of *California*.[31]

[31] California argues that its bypass flows are not inconsistent with FERC's because the state's requirements are "more stringent." (Pet. Br. at 48-49.) The implicit assumption—that a state is prohibited from easing a FERC licensee's regulatory burden, but is free to impose regulations which make project operations more difficult or impossible—finds no support in the statute. It is, in fact, inconsistent with the clear intent of the statute to encourage development of water power and the clear intent of FERC to strike the appropriate balance between water power development and other public interests.

IV. THIS CASE DOES NOT INVOLVE "WATER RIGHTS" OF THE KIND SAVED FROM PREEMPTION UNDER SECTION 27

In holding that the state regulations in *First Iowa* and *FPC v. Oregon* were preempted by the Federal Power Act, this Court recognized that, while regulatory laws are preempted, "Section 27 [of the Federal Power Act] expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act." 328 U.S. at 175; *see* 349 U.S. at 445. Throughout its brief, California attempts to exploit this distinction by casting this case as a water rights case. But—as *First Iowa* and *FPC v. Oregon* squarely hold—state regulation and protection of fishery are *not* among the areas of state law protected from preemption by section 27. Furthermore, no 'water rights" cognizable under California law are involved in this case.

A. As *First Iowa* and *Federal Power Commission v. Oregon* Hold, FERC Has Exclusive Authority to Regulate Operations of Hydropower Projects So as to Protect Fish

In *First Iowa* and *FPC v. Oregon*, Iowa and Oregon strenuously asserted the need to preserve fisheries as a substantial basis for their attempts to prevent licensing of the projects at issue. But although the Court in those cases distinguished between state attempts to regulate a federal licensee's use of water (which are preempted), and state laws concerning proprietary water rights

(which are saved); it also squarely held that water use restrictions for the preservation of fisheries are regulatory—and thus preempted—rather than proprietary. Those holdings apply in full force in this case.

In *First Iowa*, the state regulations of concern to the Federal Power Commission included Iowa Code § 7771, which required that "any water taken from the stream in connection with the project [be] returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or *rendered deleterious to fish life*" (emphasis altered). In its briefs to this Court, Iowa contended that state regulation, including the dam release requirement, was necessary to preserve the river's fishery uses:

> The record shows without dispute that no provision has been made in the plan to preserve the fish in the river or to create an adequate fish way so that fish Cedar River.[32]
>
> The project would destroy the recreational and fishing facilities afforded the public in the Cedar River as now constituted.[33]

Similarly, fishery interests were again at issue in *FPC v. Oregon*, in which the Fish Commission of Oregon had vetoed a power project because it would cut off access of anadromous fish to their natural spawning grounds. 349 U.S. at 449-50 & n.22. Oregon, too, argued vigorously that its interests in preventing depletion of the fishery in the river were not preempted by the Federal Power Act.[34]

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[32] Intervenor's Resistance to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (filed in *First Iowa*) at 4-5.

[33] *Id.* at 5; Brief for State of Iowa, Intervenor (filed in *First Iowa*) at 4.

[34] Brief for Respondents in Opposition (filed in *FPC v. Oregon*) at 5-7.

In both cases the Court held that the Federal Power Act was preemptive, and that allowing the state measures aimed at protecting fisheries to stand would result in a duplication of regulatory control not intended by Congress. 328 U.S. at 181-82, 349 U.S. at 443 n.9, 445. In so holding, the *First Iowa* and *FPC v. Oregon* opinions implicitly recognize that FERC's authority—and responsibility—for vindicating the public interest through regulation of hydropower plants is all encompassing. Thus, those cases establish beyond any doubt that California's effort to promote sport fishing by requiring specified releases from the Rock Creek Project is not a "water right" law saved from preemption. FERC is empowered to address fishery interests; it did address those interests—three times—in this case; and, as the results in *First Iowa* and *FPC v. Oregon* evidence, there is no justification in the statute or elsewhere for holding that those particular interests should be singled out for dual regulation.

B. Under California Law, This Case Implicates No "Water Rights" Whatever

First Iowa and *FPC v. Oregon* aside, California law itself demonstrates that no legally-cognizable "water rights" are implicated here.

California law recognizes two water rights doctrines: riparian rights and appropriative rights. *In re Waters of Hallett Creek Stream System*, 44 Cal. 3d 448, 452 n.2, 749 P.2d 324, 325 n.2, 243 Cal. Rptr. 887, 889 n.2, *cert. denied*, 109 S.Ct. 71 (1988). Riparian rights attach to land bordering a watercourse. *Id.* Rock Creek is located entirely on federally owned land between the project's diversion of water and its return of water to the creek. Order Issuing License (Major), 23 F.E.R.C. ¶ 62,137 at 63,203. Thus, this case does not present an issue of possible impairment of another's riparian rights.

Moreover, unlike some other Western states, California water law does not recognize any "appropriative"

water right to maintenance of instream flows. In *Fullerton v. State Water Resources Control Board*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979), the California Department of Fish and Game sought to compel the Water Board to issue a permit to appropriate water to provide minimum flow guarantees for the protection of fishery resources. *Id.* at 593, 153 Cal. Rptr. at 520. The Department did not seek to divert water, but rather sought to appropriate a minimum flow which would remain in the river "for the benefit of the fish and to protect the right of the people to fish in the public waters of this state . . . ." *Id.* at 594, 153 Cal. Rptr. at 521. After the Water Board returned the Department's application without action, the California Court of Appeal sustained the Board's position that appropriative rights could not be granted for "instream uses" for protection of fisheries. The Court of Appeal reasoned that "some minimal actual physical use of the water is still an element of the doctrine of appropriation in this state . . . ." *Id.* at 593, 153 Cal. Rptr. 520. Finding no authority for a "valid appropriation in the absence of some physical activity or possession of the land," *id.* at 599, 153 Cal. Rptr. at 524, the Court of Appeals held that:

> There is no support in the law of this State for the proposition that a minimum flow of water may be appropriated in a natural stream for piscatorial purposes without some physical act by the appropriator.

Id. at 603, 153 Cal. Rptr. at 527. *Accord, California Trout, Inc. v. State Water Resources Control Board*, 90 Cal. App. 3d 816, 820, 153 Cal. Rptr. 672, 674 (1972). California does not possess the land on which the Rock Creek project operates, nor does it plan to make physical use of the minimum flows it wishes to require. No appropriative water right is involved.[35]

[35] Although California law does not permit an instream appropriation of water to provide minimum flow guarantees to protect fisheries, California water law does consider fishery interests in appropriation proceedings. The Water Board considers the relative benefits to be derived from all beneficial uses of the water, including the preservation and enhancement of fish and wildlife, in authorizing appropriations. *See* Water Code § 1257. Again, these state interests are regulatory, not proprietary.

That California's regulation is not a "water rights" regulation is underscored by the fact that the configuration of the Rock Creek Project precludes any holder of a water right, other than the Partnership and the federal government, from being affected by the Project's operation at any bypass flow rate. No upstream or downstream water rights holder is in any way affected; the only effect is on the flow of the reach of Rock Creek on federal lands. As the Water Board conceded in the district court action, it was:

> not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.

Stipulation of Facts and Authenticity of Documents at 8, ¶ 17, *Rock Creek Limited Partnership v. State Water Resources Control Board*, No. S-87-0523 (E.D. Cal. Aug. 21, 1987) (J.A. 142).

California's claims that its bypass flow requirements should be treated as a "water right" law is further undercut by the fact that the Project already has the water rights necessary to operate. Under the California Supreme Court's unanimous decision in *In Re Waters of Hallett Creek Stream System*, 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887, *cert. denied*, 109 S.Ct. 71 (1988), the federal government, like any private landowner, has a riparian right to use water adjacent to land it owns. These rights are defined by the license to be a part of the Project which the license authorizes to operate. Similarly, under the federal reserved water rights

doctrine set forth in *Cappaert v. United States*, 426 U.S. 128, 138 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978), in withdrawing land from the public domain and reserving it for a federal purpose,[36] the federal government reserves appurtenant water, to the extent then unappropriated, to accomplish the purpose of the reservation.

Thus, California's claim that its bypass flow requirement is a "water rights" law within the meaning of *First Iowa* is belied both by the fact that no one's water rights are being affected and by the fact that the Project has water rights sufficient to operate from other sources. California cannot circumvent *First Iowa* by the simple expedient of inserting its regulations in a previously-issued permit to appropriate water. At bottom, the fact remains that in imposing the bypass flow requirement, California has not acted as an arbiter of rights between persons competing for use of water, but instead as a regulator seeking to promote public values unrelated to property interests. Under *First Iowa*, *FERC*, not the state, is responsible for assessing and promoting those values.[37]

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[36] Upon filing of the application for a FERC license, such a withdrawal was made of the federal land on which the Rock Creek Hydroelectric Project is located. 16 U.S.C. § 818.

[37] Where state-conferred water rights *are* involved, the developer of a hydropower project must secure those rights by purchase or condemnation. As this Court stated in *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369, 377, 379 (1930), the Federal Power Act "does not purport to authorize a licensee of the Commission to impair [water] rights recognized by state law without compensation." *Accord, Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251-55 (1954). *Cf. Portland General Elec. Co. v. Federal Power Comm'n*, 328 F.2d 165, 176 (9th Cir. 1964) (only purpose of section 27 is to ensure compensation for state-conferred water rights taken by federal licensees).

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Project No. 3189-014

ROCK CREEK LIMITED PARTNERSHIP

INITIAL DECISION

(November 16, 1987)

Stephen L. Grossman, Presiding Administrative Law Judge.

Appearances

John L. Sachs, Louis L. Touton and *Robert F. Schiff* for Rock Creek Limited Partnership

Steven Burton for Sithe Energies

William D. Cunningham and *Jerry Mensch* for California Department of Fish and Game

Nancy Gloman and *Randall Luthi* for U.S. Fish and Wildlife Service

Alton Albert Lind for the Lind Family, *Pro Se*

Kathryn L. Bowden, Joseph Long and *C. Stephen Angle* for the Staff of the Federal Energy Regulatory Commission

Background

On April 29, 1983, the Commission issued a license for the Rock Creek Project No. 3189, located on Rock Creek, in El Dorado County, California to Joseph M. Keating. 23 FERC ¶ 62,137 (1983). On September 10, 1985, the Commission authorized transfer of the license to the Rock Creek Limited Partnership. 32 FERC ¶ 62,566 (1985).

Rock Creek is a tributary of the South Fork of the American River, located about 40 miles east of Sacramento, California. The project consists of: (1) a 6-foot high, 80-foot-long concrete and rock overflow diversion structure at elevation 1,265 feet with 3-foot high flashboards, and impounding; (2) a 0.36-acre power forebay reservoir with a usable capacity of 5.2 acre-feet; (3) a 500-foot-long, 72-inch diameter concrete pipe; (4) a 3,200-foot-long, 9-foot diameter unlined horseshoe tunnel; (5) three 400-foot-long steel penstocks, two 36-inch-diameter penstocks and one 30-inch-diameter penstock; (6) a concrete block powerhouse at elevation 1,052 feet containing three mobile crossflow generating units, two rated at 1,125 kW each and one rated at 750 kW for a total of 3,000 kW, situated approximately 200 feet upstream of the confluence of Rock Creek with the South Fork of the American River; (7) three 100-foot-long, 4.16 kVA 4.16/12.0 kV transformer; (9) [sic] a 75-foot-long, 12-kV transmission line; and (10) appurtenant facilities. 25 FERC ¶ 62,137, at p. 63,203; Ex. FG-2.

The project requires between 15 and 240 cfs to operate. Water to operate the project is diverted at the project diversion structure through the concrete pipe, tunnel and penstock to the powerhouse, and thence back to the creek. A 5,100-foot reach of Rock Creek is bypassed by these project works, and it is this diversion reach with which we are here concerned. The gradient of the inversion reach is high (11.5 percent) upstream and low (4.0 percent) at the powerhouse.

The license, Article 37, requires the licensee to maintain interim minimum flows through the 5,100-foot bypass reach of Rock Creek of 11 cfs during the months of May through September, and 15 cfs during October through April. These minimum flows were designed to protect brown trout, the principal species then believed, as reported in the license application (Ex. FG-13 p. 3), to inhabit the bypass reach. Article 38 of the license required the licensee, in consultation with the California Department of Fish and Game (CDFG) and the U.S. Fish and Wildlife Service (USFWS), to conduct studies to determine the permanent minimum flow release and other measures needed to ensure protection and enhancement of the fishery resources in the bypass reach. The licensee was required to report its findings and obtain Commission approval for its recommendations for a minimum flow release and other fishery protection and enhancement measures.

In an October 4, 1985 report to the Commission, the licensee recommended that the interim minimum flow regime be adopted as a permanent minimum flow regime. The CDFG, on December 6, 1985, recommended that the Commission reject the licensee's report and adopt instead a permanent minimum flow regime of 30 cfs from October through February, and 60 cfs from March through September. The CDFG based this recommendation on data demonstrating rainbow trout, not brown trout, is the predominant resident species in Rock Creek. (Ex. FG-14, p. 3).

On July 9, 1986, as supplemented September 5, 1986, the licensee petitioned the Commission for a declaratory order confirming that the Commission has the exclusive jurisdiction to set minimum flows for the project and that the licensee would not have to comply with an order, when issued, that the California Water Resources Control Board (Board) was expected to issue requiring the licensee to enforce CDFG's recommended 30-60 cfs minimum flow regime.

The Commission, on March 11, 1987, affirmed its exclusive jurisdiction. It directed the Chief Administrative Law Judge to designate a Presiding Administrative Law Judge to conduct an expedited hearing to consider the minimum flow issues. 38 FERC ¶ 61,240, at p. 61,771 (1987).

The Commission ordered the Presiding Judge to consider: (1) the minimum flows necessary to "protect and enhance" the rainbow trout population, including adult, spawning, and fry habitat; (2) the impact on project operations and financial and economic feasibility of the minimum flows recommended by any party; and (3) alternative mitigation measures, if any. 38 FERC at p. 61,774.

Hearing was held July 14-16, 1987, and briefing by the parties was completed September 22, 1987.

Minimum Flows

A number of studies have been conducted to determine the minimum flow releases necessary to ensure the protection of the fishery resources. Three instream flow studies designed to examine hydraulic features of a stream and to describe the relationship between streamflow and the amount of fish habitat have been performed. Fish habitat was used instead of fish population in the instream flow studies because of significant variations that can occur in the size of fish populations over a time. (Ex. RC-24, p. 6.) Methods used by various parties to examine the effects of reduced flows on fish in Rock Creek include visual observations, the Tennant Method, and the Physical Habitat Simulation Model (PHABSIM). Because no site-specific habitat curves have been developed for Rock Creek, generic curves (known as Bovee's and Raleigh's) were used. Several sets of hydrological data were also presented.

Each method relates, in greater or lesser measure, to the Instream Flow Incremental Methodology (IFIM) developed by the USFWS Instream Flow Group. The IFIM includes the PHABSIM model, which incorporates fish suitability curves, and data on temperature, water quality, hydrology, and population.

Based upon the testimony sponsored by the parties, the following minimum flows are proposed:

Licensee	Year-round	15 cfs
CDFG	October 1—February 29	30 cfs
	March 1—September 30	60 cfs
Staff	January 1—February 29	30 cfs
	March 1—May 31	50 cfs
	June 1—30	25 cfs
	July 1—October 31	15 cfs
	November 1—December 31	20 cfs

The project cannot operate without at least 15 cfs of water diverted to the powerhouse, and cannot use more than 240 cfs in operation. Thus, Rock Creek flow of the prescribed minimum plus 15 cfs is necessary for the project to operate. Similarly, all flows in excess of prescribed minimum flow plus 240 cfs will remain in the bypass reach. Licensee stipulated at the hearing that it would observe 15 cfs as the year-round minimum flow during the pendency of this case (Tr. 273). Under this regime, natural creek flow will have to equal 30 cfs before the project can operate; flows in excess of 255 cfs will flow through the bypass reach in addition to the required 15 cfs minimum. This means the bypass reach will flow at its natural level up to 29 cfs. From creek natural flows between 30 and 255 cfs, the bypass reach will have a flow of 15 cfs. Above 255 cfs natural flows, the bypass reach will benefit from 15 cfs plus all water over the 255 cfs level.

River hydrology was described by Dr. John H. Humphrey (Ex. RC-1) and Mr. James A. Schuler (Ex. FG-13, citing a DFG report submitted as Ex. FG-14). There is little difference between the two presentations. Annual

mean flows are determined by Humphrey to be 86.1 cfs and by DFG to be 58.1 (Ex. S-22). For purposes of this decision, the higher 86.1 cfs figure will be used. Similarly, resident fish population data presented by CDFG (See Ex. RC-78), which disclose higher numbers than the data of licensee, shall be used. In other words, those data more favorable to a higher fishery base line are used in determining the level of protection to be afforded the fishery.

Four matters have been raised by Licensee and CDFG which will be disposed of first. Interpretation of Articles 37 and 38 of Rock Creek's license is not properly an issue. The Commission hearing order of March 11 resolved the questions raised by the parties. Also not at issue here is the assertion by CDFG that the provisions of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 (Oct. 16, 1986), do or should apply in this case. That they do not is made clear by the March 11 order (at 38 FERC at p. 61,774, n. 6). This issue may not be relitigated now. Additionally, no party suggests any mitigation measures apart from recommended minimum flows, and, therefore, none will be discussed. Finally, the issue of balance between fishery and power (except as to levels of minimum flow) has been decided in the original licensing case, and is not at issue here.

The fish we are concerned with are native, resident rainbow trout achieving adulthood at about five-to-seven-inch length. They are the predominant sport fish in Rock Creek. They are not, however, the most numerous Rock Creek fish. Rainbow trout are outnumbered by suckers, squawfish and sculpins. Other fish, including green sunfish and brown trout, are also present (Ex. RC-24). The parties agree minimum flows through the almost mile-long diversion reach are necessary to protect the resident fishery.

Two basic methods are used to support minimum flow recommendations in this case. Licensee proposes flows

based upon its analysis of requirements to maintain sufficient habitat to ensure survival of the existing, pre-project fish population in the diversion reach. CDFG and Staff analyze necessary flows as a required percentage of average annual natural flow to maintain maximum pre-project habitat in the affected reach.

Licensee presented studies of Mr. Thomas R. Payne, a Certified Fishery Scientist as recognized by the American Fisheries Society, and Dr. Donald Chapman, who holds a doctorate in fisheries. Both have extensive experience in studying fisheries on rivers and streams. Ex. RC-24, 25, 32, 33.

Their analyses show that Rock Creek is a "flushing" stream, having widely divergent median flows in different seasons of the year, and from year to year. Sustained flows average 11 to 13 cfs in summer and more than ten times that amount in winter, with flooding from winter storms in some years up to a thousand times the summer flow (Ex. RC-1, 23, 32). In poor water years, sustained summer flow can be as low as 5 cfs (Ex. RC-32, Tr. 187).

The diversion reach is a box-shaped channel. Unlike most streams which have a more saucer-like cross-section, the box shape of the diversion reach results in much lower loss of wetted stream perimeter as water level declines. As a result of this atypical stream bed configuration, Mr. Payne concludes the wetted perimeter of the diversion reach increases only 11 percent in the high gradient section and 16 percent in the low gradient section when water flow increases from 15 to 60 cfs, and 18 percent when water flow increases from 10 to 60 cfs (Ex. RC-24).

Dr. Chapman notes that either very high winter flows or very low summer flows act to "pinch" resident rainbow trout population in Rock Creek, and that there is little migration upstream into the diversion reach from

the South Fork of the American River because of numerous cascades in the area (Ex. RC-76).

Dr. Chapman visited Rock Creek on May 5, 1987. The project was not operating at the time because prior high water had caused damage to the diversion fish screen. He measured stream flow over the diversion structure as 15 cfs, although the gauge, which is not particularly accurate at low flows, read 12 cfs.

Dr. Chapman examined the habitat available to the resident fish and found spawning gravel in the diversion section sufficient to sustain the observed population. He observed that Rock Creek rainbow trout mature to smaller size than do rainbow trout at higher elevation rivers and streams. Thus, Rock Creek trout require smaller gravel for spawning because of their inability to move the larger stones to form redds.

Dr. Chapman's visit coincided with the fishing season on Rock Creek which opened April 26, 1987. Ex. FG-6. He observed little evidence of fishing activity along the diversion reach. Mr. Lind, an upstream license applicant, testified that he has observed virtually no fishing activity in this stretch of Rock Creek over a period of several years. Ex. L-1. He added that the diversion reach is particularly difficult to enter for anglers since it is situated in a steep-sided canyon with limited access. CDFG and Staff argue Rock Creek is a little gem of an undiscovered fishery. The evidence belies this claim. Two Sacramento newspapers reported Rock Creek as an early season fishery (Ex. F-5, 6) at the onset of the fishing season, yet no evidence of use of the stream was noted at the diversion reach on the tenth day of the season. Whatever Rock Creek may be as a fishery, especially in the vicinity of the diversion reach, it is not shown to be a popular one. Nor is it shown that access might be improved to allow greater fishing opportunities, especially in the diversion reach.

Based on their examination of the diversion reach, Mr. Payne and Dr. Chapman recommend year-round minimum flows of 15 cfs as sufficient to protect the preproject fish population. Both observed the existing habitat on the date of their visit with a measured 15 cfs flow was not fully utilized by the resident fish population. Inasmuch as the visit occurred at the height of the fishing season, it is expected that the maximum number of adult fish would be present. Thus, their observations occurred at their recommended flow level with the maximum or close to the maximum number of adult fish present. (Ex. RC-32, 68.)

Mr. Payne had testified that a minimum flow of 10 cfs would be sufficient because of the consistency of habitat area at varying flows, but he felt more comfortable with a 15 cfs flow (Tr. 91-93). He found that the 15-20 cfs range represents the inflection point at which flow reduction begins to draw water away from stream banks and thus reduces habitat area.

The analysis methodologies used by CDFG and Staff had their bases in preserving the greatest amount of habitat as measured by model transect curves and their application. CDFG began with the so-called Tennant method, developed by Donald L. Tennant for the U.S. Fish and Wildlife Service in 1975 (Ex. FG-20). That method calls for a minimum instantaneous flow of 10 percent of annual average flow to sustain short-term habitat for most aquatic life forms. A 30 percent flow will sustain good habitat, while 60 percent will sustain excellent to outstanding habitat. Tennant, however, developed his criteria on rivers having the usual saucer-shaped contour, where relatively small changes in flow would have significant effects upon available habitat. Tennant reported (Ex. FG-20) that on systems he studied, 10 percent flow covered only 60 percent of the substrates. As reported by Mr. Payne, a 10 cfs flow covered virtually all usable substrate on Rock Creek.

Staff's recommendations were presented by Mr. Edward L. Melisky, an ecologist who earned a master's degree in fisheries management, and who is certified by the American Fisheries Society as a Fisheries Scientist. Ex. S-17. CDFG presented recommendations prepared by Mr. Mike Meinz and Mr. James A. Schuler. Mr. Meinz is an Associate Fisheries Biologist with the CDFG. He holds a bachelor's degree in Fisheries Biology, and has extensive experience in analyzing flows necessary to protect resident trout populations in California rivers. Mr. Meinz visited Rock Creek many times since 1983 and participated in two fish population surveys on the stream. Ex. FG-1. Mr. Schuler holds a bachelor's degree in Natural Resources Management, and is an Assistant Fisheries Biologist with the CDFG. He participated in the CDFG analysis of Rock Creek and the Rock Creek fishery. He has visited Rock Creek on several occasions. In large measure, his recommendations are based on his perceived need for flows, at least in spring and summer, most conducive to fishing. Ex. FG-13.

CDFG used Bovee curves to determine the adequacy of habitat and fish preference at the 60/30 cfs flow levels it supports. It found sufficient habitat and concluded appropriate fish preference at that level. It is noted CDFG calculated 60 cfs as 60 percent of annual average flow, even though the average flow is 86.1 cfs.

Staff similarly used Bovee curves to determine the maximum habitat area which could be provided.

Licensee disagreed with reliance on Bovee, rather than the more recent Raleigh curves which had been developed for western Sierra streams. Staff and CDFG argue Bovee curves were agreed to in the Article 38 study. This is not so. The agreement was to use published curves. Only Bovee curves were published at that time, but the use of newer, published curves was not prohibited.

Here, however, the argument is one of no consequence. Neither set of curves is particularly meaningful in the

atypical diversion reach. Data from the curves simply are not descriptive of reality in Rock Creek.

Reliance on the Tennant methodology and Bovee curves, neither of which provides accurate, site-specific data, cannot be given controlling weight.

Where all this leaves us, then, is with the site-specific Payne/Chapman analysis and recommendation of year-round 15 cfs flows. Mr. Payne, however, informs us that the inflection point occurs somewhere between 15 and 20 cfs. Therefore, caution and due concern for the fishery requires a minimum year-round flow in the diversion reach of 20 cfs. In real water terms, this means the diversion reach will have natural flow of Rock Creek at natural flows up to 35 cfs. For natural flows of 35 to 260 cfs, the diversion flow will be 20 cfs. At natural flows above 260 cfs, the diversion flow will be the excess above that flow plus 20 cfs. This flow regime has been shown by Mr. Payne and Dr. Chapman to provide sufficient habitat to maintain at least the pre-project fishery.

CDFG and Staff maintain that low flow levels will raise water temperatures in the diversion reach. That effect is less likely at 20 cfs, and, in any event, has not been demonstrated to be of significant adverse concern. The diversion reach will have flowing water at all times. The stream bed is overhung with considerable vegetation, shielding it from much of the direct summer sun. More importantly, naturally occurring summer flows are so low that the project will rarely operate during the hot months. CDFG's argument that lower flows will increase fishing pressure by increasing an angler's chances of success is not persuasive especially in the absence of showing that there is significant fishing activity.

This is not to find CDFG's concerns are misplaced. They are not. Nor are those of Staff. The decision here finds the results intended by both, as well as by licensee, will be met in the manner set forth above.

There remains the matter of the financial ability of the project to operate at various flow levels. This has now become a non-issue. Licensee could continue to operate, albeit marginally, at the flow level proposed by CDFG, and with a somewhat higher return under Staff's proposal. Licensee's ability to operate with a measure of financial security at the flows directed here seems evident. This is true whether licensee's investment and rate base are calculated as propounded by Staff or licensee.

Staff, which views only the initial cash investment and costs of the project, is correct in this regard. The financial feasibility of the project must be viewed as of the time of license application. Licensee was on notice by the license issued that minimum flows might be increased, thus imperiling the success of the project. All subsequent actions of the licensee and his successor, including the payment by the successor for the original licensee's rights and property, were at its own risk.

As a result of this decision, licensee's actual return will be lower than that contemplated by the license application because of increased minimum flows, the cost overruns experienced in constructing the project, and, in licensee's calculation, the amount paid Keating for his interest in the project. The return will be somewhat less than contemplated by licensee when it purchased Keating's interest because of the increased minimum flows. Precise quantification of return at the ordered minimum flow is not possible on this record because no party proposed that precise flow and presented relevant evidence. The return, however, is sufficient to preserve the power-fishery balance struck by the Commission in the original license proceeding, for here, unlike most hydroelectric development cases, the pre-project fishery will be completely preserved, not merely protected at some lower level, while the licensee operates with sufficient financial stability.

Licensee proposes, on brief, additional monitoring to determine if the ordered minimum flow is appropriate over time. Staff, in its reply brief, agrees. The proposal has significant merit, for there is no guarantee of success in any minimum flow regime. Since there is no specific plan of record to accomplish this task, licensee shall be directed to develop, obtain CDFG and Staff concurrence for, and file such a plan. The plan shall permit reassessment of minimum flows by the Commission at the end of a 5-year period, or sooner if a party demonstrates a substantial need.

It is ordered, subject to the Commission's Rules of Practice and Procedure:

(1) That the first sentence of Article 37 of the license issued April 29, 1983 (23 FERC ¶ 62,137) in Project No. 3189, is amended to read:

Licensee shall discharge from the Rock Creek diversion dam continuous minimum flows equal to the lesser of inflow to the reservoir or 20 cubic feet per second (cfs).

(2) That licensee shall, within 90 days of the effective date of this order, develop a monitoring plan to assess the effectiveness of the minimum flow directed in paragraph (1) of this order, obtain concurrence of the California Department of Fish and Game and Commission Staff, and file that plan pursuant to Article 38 of the license.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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QUESTION PRESENTED

Whether Section 27 of the Federal Power Act, 16 U.S.C. 821, reserves to the States the power to impose minimum in-stream water flow requirements on a hydroelectric project that are inconsistent with those specified in a license issued by the Federal Energy Regulatory Commission.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 877 F.2d 743. The pertinent orders of the Federal Energy Regulatory Commission (Pet. App. A14-A22, A23-A36) are reported at 38 F.E.R.C. ¶ 61,240 and 41 F.E.R.C. ¶ 61,198.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1989. The petition for a writ of certiorari was filed on August 26, 1989. The petition was granted on December 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, are reproduced at App., *infra*, 1a-10a.

STATEMENT

Acting under authority conferred by the Federal Power Act, 16 U.S.C. 791a *et seq.*, the Federal Energy Regulatory Commis-

sion issued a license to the predecessor of respondent Rock Creek Limited Partnership for a hydroelectric project on federal public lands in California. One of the conditions of the license required the licensee to maintain specified minimum flows in the portion of the stream affected by the project. The licensee also applied for and received a water permit from the California State Water Resources Control Board. The Board, however, conditioned the permit on the maintenance of substantially higher in-stream water flows than those prescribed by the federal license. Petitioner seeks further review of a decision holding that the licensee may adhere to the in-stream flow requirements in the federal license, rather than the conflicting condition set forth in the state agency's water permit.

1. The Rock Creek project is a 3,000-kilowatt hydropower facility located on Rock Creek, a tributary of the South Fork American River in California. The project diverts water from Rock Creek, passes it through power turbines, and returns it to the American River approximately one mile from where it is diverted. The affected stretch of the stream lies entirely within federal public lands. See J.A. 14, 22-23, 52; Pet. App. A2.

On April 29, 1983, FERC entered an order granting a license for the project to Joseph M. Keating, the predecessor in interest of respondent Rock Creek Limited Partnership (the Partnership). J.A. 13-50; Pet. App. A14. The federal license included numerous conditions based on findings regarding the project's safety and economic feasibility, its effect on stream flows, its impact on environmental and cultural resoures, measures for protecting fish in the area, plans to create new recreational facilities, and the disposition of the power. J.A. 14-21.

One of the license's conditions, which was based on a study by the Partnership and a recommendation by the California Department of Fish and Game, required the Partnership to maintain minimum in-stream flows in the affected stretch at 11 cubic feet per second (cfs) from May through September and 15 cfs from October through April on an interim basis. "Based upon available information," the Commission concluded, these interim releases "would not adversely impact the fishery re-

sources of Rock Creek." J.A. 15-16.[1] The Commission also required the Partnership to conduct studies in conjunction with the California Department of Fish and Game to enable the Commission to set long-term minimum flow rates. J.A. 16.

The Commission concluded that "subject to the terms and conditions of the license, the Rock Creek Project is best adapted to a comprehensive plan for development of the South Fork American River Basin for beneficial public uses." J.A. 21.

2. The Partnership also applied to the California State Water Resources Control Board for a state water permit. On February 16, 1984, the Board granted a permit, finding that "sufficient water appears available to justify the requested diversion rates." J.A. 58. In considering whether the project would represent a beneficial use of water, the Board canvassed many of the same considerations that the Commission had addressed, including the need for the power from the project, the project's economic feasibility, and its environmental consequences. J.A. 54-58. The Board disputed the Commission's assessment of the project's effect on fish, stating that "no valid basis exists for the minimum flows proposed by • • • the Federal Energy Regulatory Commission." J.A. 59. Accordingly, while it granted a permit, the Board reserved jurisdiction to increase its in-stream flow requirements and directed the Partnership to undertake additional studies of the project's effect on fish. J.A. 60, 65-66.

In a subsequent order, the Board amended the permit to increase the required minimum flows to levels substantially higher than those established by the FERC license. J.A. 73-125. As

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[1] The Commission noted that its staff believed that the fish population in the affected stretch of the steam was constrained by factors other than "available adult habitat"—specifically, limited habitat for spawning and rearing fish and wide natural variations in stream flow caused by floods and periods of low water. J.A. 13. If that view was correct, the maintenance of higher in-stream flows would not result in greater numbers of adult fish. The State Water Board disagreed with this finding. See J.A. 115-119. The dispute in this case thus arises out of a difference over the interpretation of scientific data regarding the factors that determine the numbers of fish in the affected one-mile section of the stream.

amended, the state permit requires stream flows of 30 cfs for July through February and 60 cfs for the remainder of the year. J.A. 124. The Water Board has reserved jurisdiction to fix still higher flow requirements. J.A. 123-124.

3. a. In the meantime, the Partnership petitioned FERC for a declaratory order that the Commission had exclusive jurisdiction to establish long-term minimum flow rates. In March 1987, the Commission issued an order holding that the State "has no authority to set minimum flows for the project that conflict with those contained in the [FERC] license." Pet. App. A18. The Commission explained that "[t]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process" under the Federal Power Act and that, "[a]s such, the establishment of minimum flows is a matter beyond the reach of state regulation." *Id.* at A17. In the Commission's view, "[a]llowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing," and "would essentially vest a veto authority over projects in the states." *Id.* at A17-A18.[2]

b. In a subsequent order, the Commission granted petitioner leave to intervene in the proceeding, but rejected its contention that the Federal Power Act's savings clause, Section 27, 16 U.S.C. 821, authorized the State Water Board to exercise concurrent jurisdiction over in-stream flows. Pet. App. A22, A23-A36. The Commission concluded that this Court's decision in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152 (1946),

[2] In submissions to the Commission, the Partnership argued that compliance with the 30 cfs and 60 cfs requirements established by California authorities would render the project economically infeasible. Pet. App. A16-A17. Accordingly, the Commission convened a hearing before an administrative law judge to determine long-term flows for the project, taking into account both the impact of minimum in-stream flows on the fish population in the stream and on the financial feasibility of the project. *Id.* at A21-A22. The ALJ has issued an initial decision establishing long-term flow requirements at a higher level than the interim flows prescribed by the Commission but not as high as the State's Water Board had established. See *Rock Creek Ltd. Partnership*, 41 F.E.R.C. ¶ 63,019 (1987). Administrative appeals are pending before the Commission.

"clearly stands for the proposition that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a) of the FPA are preempted." Pet. App. A28. The Commission reiterated that "the imposition of mimimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process." *Id.* at A29. Although petitioner urged that the Federal Power Act's savings clause, Section 27, authorized States to prescribe minimum flow requirements, the Commission stated that this interpretation of the savings clause would render the Commision's comprehensive planning responsibility "meaningless." *Ibid.* The Commission rejected petitioner's argument that this Court's interpretation of Section 27 in *First Iowa*, which limited the savings clause to state laws recognizing proprietary rights in water, was dicta that had effectively been overruled in *California* v. *United States*, 438 U.S. 645 (1978). Pet. App. A30-A31, A34. The Commission also concluded that the enactment of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243, reinforced its interpretation of Section 27. Pet. App. A35.

4. California petitioned for review, and the court of appeals affirmed. Pet. App. A1-A13. The court examined the Federal Power Act "as a whole" to "determine how Congress intended to divide authority between the states and the federal government over hydropower projects." *Id.* at A7. "The weight of the [Commission's] comprehensive planning authority and the individual powers assigned to support that authority," the court declared, "fall[] quite heavily on the side of federal exclusivity." *Id.* at A8. The court stated that Section 27 was susceptible of "two conflicting readings"—one under which state authority was limited to "the area of property rights involving water for irrigation, municipal use, and related activities" and another under which the States would have "final authority over all issues connected to the control and use of water by a project licensed under the FPA." *Id.* at A8-A9. *First Iowa*, the court of appeals concluded, bound it to apply the first of these interpretations. *Id.* at A11.

The court rejected petitioner's contention that *First Iowa*'s discussion of Section 27 of the Act was dicta that had been

called into question by *California* v. *United States, supra*. Pet. App. A11-A12. And the court agreed with the Commission that petitioner's interpretation of Section 27 would effectively enable California to veto a project approved and licensed by the Commission, since changing minimum flow rates established in the federal license "would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license" and "would, in essence, create a different type of hydropower project from the one described in the license." Pet. App. A12.

SUMMARY OF ARGUMENT

Like *First Iowa Hydro-Elec. Coop.* v. *FPC, supra*, this case presents the question whether a hydropower project licensed under the Federal Power Act must comply with state regulatory requirements inconsistent with the terms of the federal license. As part of a process that provides for input from interested state and federal authorities, the Federal Energy Regulatory Commission has granted the Partnership a federal license, established minimum in-stream water flows on an interim basis, and reserved jurisdiction to establish long-term requirements. Its goal has been to protect fish in the affected reach of the stream, while also permitting effective development of its water power potential. Acting under authority of state water law, the California Water Resources Control Board has reviewed many of the same considerations that the Commission has addressed, but has disagreed with the Commission's judgment and has established substantially higher in-stream flow requirements than those in the federal license. In effect, the Board has found that a project the Commission has determined will advance the purposes of the Federal Power Act does not represent an appropriate use of water under state water law.

I. The question presented by these conflicting assertions of regulatory authority is one of statutory interpretation. There is no question that Congress has authority under the Commerce Clause and the Property Clause to regulate hydropower development upon the waterways subject to the Act. Under Sections 4(e) and 10(a) of the Act, 16 U.S.C. 797(e), 803(a), Con-

gress has exercised that constitutional authority by empowering FERC to issue licenses for hydropower projects that reflect the Commission's judgments regarding the projects' effects on a variety of interests—many of which are national or regional in scope. The question presented is whether the Act's savings clause, Section 27, reserves authority to the States to impose regulatory requirements on those projects that are inconsistent with license conditions that FERC has determined are appropriate to serve the public interest.

A. The Court's decision in *First Iowa* resolved that question in favor of the Commission. In that case, the Court reached and decided the question whether the Federal Power Act superseded a state statute regulating the construction of dams and the diversion of water. The Court concluded that the Federal Power Act left no room for conflicting state control over those aspects of hydropower development that the Act commits to the Commission's judgment, and construed Section 27 to preserve only those state water laws that establish proprietary rights in water. The Court's interpretation of Section 27 was necessary to the Court's decision, and it is controlling here.

B. The language of the savings clause and the remainder of the statutory scheme fully support *First Iowa's* interpretation. The category of laws that may potentially relate "to the control, appropriation, use, or distribution of water" is so broad that it could nullify the affirmative grant of authority to FERC; thus, it is appropriate to read the ensuing phrase "used in irrigation or for municipal or other uses" as a limitation on the category of laws saved. The references to water "used" and the particular uses enumerated in Section 27 are strongly suggestive of uses of water that give rise to proprietary rights under systems of water law based upon the principle of first appropriation. As *First Iowa* noted, the reference to "vested rights" reinforces the construction of Section 27 as limited to laws recognizing proprietary rights.

Since Section 27 is a savings clause, its interpretation must also reflect its role in the statute as a whole. Sections 4(e) and 10(a) of the Act vest the Commission with broad authority to direct the course of hydropower development by means of its licensing judgments. Congress clearly expected that those judg-

ments would be put into effect in the development of the Nation's hydropower resources. Thus, Section 27 should be construed in a manner that will not subordinate the Commission's determinations concerning the appropriateness of various projects to state law regulating the use of water.

C. The principle of *stare decisis* strongly supports this conclusion. This Court and other state and federal courts have faithfully applied *First Iowa* for almost 45 years. Congress has not seen fit to overrule that decision. Indeed, in 1986, Congress enacted the Electric Consumers Protection Act, a statute designed to channel state concerns regarding the environment and the comprehensive development of water basins through the Commission's licensing process. It is clear that Congress did not intend to allow States to veto the results of these procedures by imposing inconsistent regulatory requirements on the use of water. Finally, the Court's decision in *California* v. *United States, supra*, does not support the abandonment of *First Iowa*. By contrast to Section 27, the savings clause in the Reclamation Act at issue in *California* v. *United States* expressly requires the Secretary of the Interior to proceed "in conformity with [state] laws." The nature of the Federal Power Act's delegation of authority to the Commission also distinguishes this case from *California* v. *United States*.

D. The legislative history of the Federal Power Act does not justify revising *First Iowa*'s interpretation of the Federal Power Act and its savings clause. As this Court noted in *First Iowa*, that history is fully consistent with the Court's construction. Moreover, the doctrine of *stare decisis* weighs heavily against reconsideration of a settled interpretation of a statute based solely upon further review of its legislative history.

II. Applying the standards recognized by this Court in *First Iowa*, the Commission and the court of appeals correctly determined that the State Water Control Board lacked authority to impose in-stream flow requirements inconsistent with those prescribed in the federal license. Under California law, in-stream flows for the purpose of preserving fish cannot be the subject of a water right; thus, the in-stream flow condition in the State Water Board's order does not fall within *First Iowa*'s interpretation of Section 27. Further, the Board's imposition of

minimum flow requirements higher than those prescribed by the federal license conflicts directly with the Commission's exercise of its licensing authority. As the Commission explained, allowing the Water Board to impose its higher flow rates would interfere with the balance the Commission has struck under Section 10(a) between the economic and environmental consequences of the project. Both the Commission and the court of appeals were correct, therefore, in holding that the state in-stream flow requirements were unenforceable.

ARGUMENT

I. SECTION 27 DOES NOT RESERVE AUTHORITY TO THE STATES TO VETO THE EXERCISE OF THE COMMISSION'S AUTHORITY TO DETERMINE WHETHER AND ON WHAT TERMS A HYDROPOWER PROJECT WOULD REPRESENT AN APPROPRIATE USE OF WATER RESOURCES

This case calls upon the Court to determine the respective roles of two basic provisions of the Federal Power Act: (1) the affirmative grant of authority to the Federal Power Commission, now FERC, to determine – based upon its assessment of the economic, environmental, and other effects of a proposed water power project – whether and on what terms the public interest warrants issuance of a federal license for the project and (2) a savings clause, Section 27, that preserves from federal preemption certain state laws and vested rights.

The Federal Power Act delegates comprehensive authority to FERC to oversee the course of hydropower development. When the Commission issued its license in this case, Section 10(a) of the Act, 16 U.S.C. 803(a) (1982), provided that a license could be issued only when, "in the judgment of the Commission," the proposed project would be

> best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses * * *.

Under this Section, the Commission is responsible for exploring "all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public

interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife." *Udall* v. *FPC*, 387 U.S. 428, 450 (1967). With the passage of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 [ECPA], Congress affirmed the Commission's responsibility for assessing the environmental consequences of hydropower projects and their effects on other "beneficial uses" of water, including "irrigation, flood control, water supply, and recreational and other [uses]." See 16 U.S.C. 797(e), 803(a).

In addition to this broad grant of authority to the Commission, the Federal Power Act also contains a savings clause, Section 27 (16 U.S.C. 821), which provides that nothing in the Act

> shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Petitioner maintains that Section 27 requires hydropower projects to comply with all state laws related to the "control, appropriation, use, or distribution of water," "irrespective of any rights and obligations under a FERC license." See Pet. Br. 10. Under this interpretation, every hydropower project on any navigable or non-navigable waterway within the Act's scope must comply with all state laws relating to the use of water, even if the effect is to foreclose development of the project on the terms that the Commission has determined would best serve the public interest.

This sweeping construction of Section 27 would, we submit, effectively nullify the authority that Congress delegated to the Commission. Section 27 preserves an important sphere of state authority and is unquestionably a significant element of the statutory scheme. But, as this Court held in *First Iowa*, it should be read to save only state laws recognizing proprietary rights in water—rights that entitle the owner to use (or to prevent others from using) water and that can be transferred or, if need be, condemned under Section 21 of the Act, 16 U.S.C. 814. In other words, Section 27 requires a federal licensee to acquire, either

by purchase or through the appropriate exercise of eminent domain, any property rights in water recognized under state law with which a proposed project would interfere. It does not, however, authorize state governments to exercise regulatory authority—either by statute or through the attachment of regulatory conditions to water rights—inconsistent with the Commission's exercise of its authority to determine what hydropower project will best serve the various interests committed to its judgment.

A. *First Iowa* Is Controlling With Respect To The Question Presented By This Case

In determining the scope of Section 27, the Court is not writing on a blank slate. Over forty years ago, in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152 (1946), the Court examined the line that the Act draws between federal and state regulation and, in so doing, authoritatively construed Section 27. That decision—which limits Section 27 to state laws recognizing proprietary rights in the use of water—is controlling here.

1. In *First Iowa*, an applicant sought a license to build a power project on navigable waters in Iowa. The State argued that the Commission was obligated to deny the license because the applicant had not complied with Section 9(b) of the Act, 16 U.S.C. 802(b) (1982); that Section requires an applicant to provide the Commission with "[s]atisfactory evidence that the applicant has complied with the requirements" of certain state laws, including laws involving "the appropriation, diversion, and use of water for power purposes." In particular, the State contended that the applicant was ineligible for a license because it had not acquired a state permit for construction of a dam. To obtain such a permit, Iowa law required the applicant to show, among other things, that "any water taken from the stream in connection with the project [would be] returned thereto at the nearest practicable place." 328 U.S. at 164-166 (emphasis omitted).

This Court held that the applicant was not required either to obtain a state permit or to demonstrate compliance with state

law as a condition to the issuance of a federal license. 328 U.S. at 164, 170, 175, 177-178. Petitioner suggests that this decision can be read to hold only that Section 9(b) does not require an applicant to show compliance with state law *before* a federal license will issue – leaving open the question whether Section 27 would require compliance with state law *after* the federal license is granted. See Pet. Br. 42-43 & n.24. But that reading cannot be squared with the Court's reasoning. The Commission had dismissed the application on procedural grounds, without reaching the question whether Iowa had authority to demand compliance with its return flow requirement. 328 U.S. at 162. But as the Court observed, "[w]hile this avoid[ed] subjecting the petitioner to an arbitrary and capricious refusal of the permit it [did] not meet the substance of the objection to the order." *Id.* at 165. The Court further noted that the Commission subsequently took the position in its briefs and argument in this Court "that the requirements of Chapter 363 of the Code of Iowa as to this project have been superseded by those of the Federal Power Act." *Id.* at 161. The Court clearly chose to resolve the case on this broader ground. As the Court observed, "[i]f a state permit is not required, there is no justification for requiring the petitioner, as a condition of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a state permit." *Id.* at 166-167.

The Court found that the question whether compliance with the state law could ever be required was presented because the Iowa statute made clear – as state officials asserted (328 U.S. at 171) – that the applicant could not possibly comply with the terms of the application and also obtain a state permit. The project would have diverted water from a 29-mile stretch of the Cedar River, and thus could not satisfy the state requirement that water taken from a river be "returned thereto at the nearest practicable place." *Id.* at 166. Accordingly, the Court "accept[ed]" that compliance with the Iowa statute would be impossible. *Id.* at 171.

On this assumption, the Court proceeded to examine the relevant provisions of the Federal Power Act – including Section 27 – and the Act's "long and colorful legislative history" (328

U.S. at 171), and concluded that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181. The Court stated that requiring the applicant to secure a state permit would "vest in [state authorities] a veto power over the federal project" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" with which the Commission was charged. *Id.* at 164. To compel compliance with such a state law, the Court continued, would "subject to state control the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission." *Id.* at 165. Thus, the Court held that the Iowa statute was preempted by the Federal Power Act. As the Court concluded (*id.* at 182): "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."

In reaching this conclusion, the Court gave extensive consideration to Section 27. 328 U.S. at 175-177 & n.20. Although the Court explained the purpose of its discussion of Section 27 partly in terms of confirming its understanding of the limited reach of Section 9(b) (328 U.S. at 175), there can be no doubt that its construction of Section 27 was essential to the conclusion that the Iowa statute was preempted by the Federal Power Act. If Section 27 preserved the Iowa statute requiring that any water taken from the stream be returned at "the nearest practicable place," then the Court could not have held that Iowa was without authority to insist on compliance with that provision. Indeed, the State of Iowa expressly advanced the argument, indistinguishable from petitioner's here, that its statute was saved by Section 27.[3] Thus, contrary to petitioner's contention, the

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[3] In its brief in this Court, Iowa argued (Brief for the State of Iowa at 19):

> An examination of Section 27 (821) indicates clearly that Congress did not intend "in any way to interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." This language is broad and general. It effectively saves all State

Court's determination in *First Iowa* that Section 27 is limited to state laws establishing proprietary rights in the use of water and vested rights therein was not "dicta." That discussion was necessary to the Court's holding, and should be controlling here.

B. *First Iowa* Is Fully Justified By The Language of Section 27 And Its Place In The Statutory Scheme

Petitioner takes issue with *First Iowa*'s analysis of both the text of Section 27 and the overall plan of the Act. It argues that limiting Section 27 to laws giving rise to proprietary water rights and vested rights therein would render the first clause of the section superfluous (Pet. Br. 10) and that the Court's decision in *First Iowa* reflects an unprincipled presumption against "dual systems" of state and federal regulation (*id.* at 40). These contentions are without foundation. The Court's analysis of Section 27 in *First Iowa* was well grounded in the language of the Section and the statute as a whole.

1. Section 27 does not save all state laws "relating to the control, appropriation, use, or distribution of water." Only laws involving "water used in irrigation or for municipal or other uses"—or "any vested right acquired therein"—are preserved.

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laws upon the subjects referred to. There can be no question but that the laws of the State of Iowa heretofore referred to relate to the control, appropriation, and use of waters for municipal as well as other uses. * * * The Executive Council has the duty in the first instance to determine whether or not petitioner's proposed project will interfere with the uses of the water by the public and by cities and towns located along Cedar River.

Throughout its brief, Iowa emphasized that the towns on the Cedar River that would be bypassed by the project used its flow to dispose of their sewage, and that this was a "municipal use." *Id.* at 7, 15, 19. This Court did not take issue with this characterization and thus necessarily rejected Iowa's interpretation of Section 27, which is indistinguishable from petitioner's here.

Petitioner argues that *First Iowa* can be distinguished on the ground that it was not "a water rights case" and that the applicant had acquired substantially all of the riparian rights involved. Pet. Br. 35 n.18. This attempted distinction contradicts petitioner's own interpretation of the statute; petitioner claims that Section 27 requires compliance with all state regulation relating to water, not just the acquisition of water rights.

As *First Iowa* recognized, this language must entail a limitation on the category of laws that are saved. If, as petitioner suggests, it had been Congress's intention to reserve to the States all of their authority to regulate the use of water, there would have been no need to refer to any of its specific uses or, for that matter, to "vested right[s]."

First Iowa's analysis of the nature of the limitation embodied in Section 27's language is thus entirely sound. The Court first noted that Section 27 "is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." 328 U.S. at 175-176. The explicit reference to irrigation and municipal uses, the Court observed, indicates that the clause "has primary, if not exclusive, reference to such proprietary rights." *Id.* at 176. The Court found further support for this view in the phrase, "any vested right acquired therein." There is no reason to assume that the category of laws and the "vested rights" referred to in Section 27 are independent of one another. As *First Iowa* noted, it is appropriate to view the latter as intended to "emphasize[]" the Section's application to property rights. 328 U.S. at 176.[4]

The only language in Section 27 that might suggest a broader scope is the reference to "other uses." But *First Iowa* properly concluded that the interpretation of that phrase was governed by the "ejusdem generis" canon of construction (328 U.S. at 176):[5]

> Those words ["other uses"], however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to

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[4] The legislative history indicates that, during debates of an antecedent of Section 27, the phrases "used in irrigation or for municipal or other uses" and "vested rights therein" were viewed as limitations on the savings clause. See pp. 35-37, 39-40 & n.33, *infra*.

[5] This canon provides that general words following specific words in a statutory enumeration are to be construed to embrace objects similar in nature to those covered by the specific words. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 74 (1984).

> § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 619.[8]

This construction – limiting "other uses" to other proprietary uses – is eminently sensible. Irrigation and municipal uses are beneficial uses that can give rise to proprietary rights in water, and thus it is plausible to view the phrase "other uses" in a similar light. The phrase "used in" supports that interpretation; ordinarily, beneficial use is required to create – and continued use to preserve – an appropriative water right. Particularly in terms of the water systems prevailing when the Federal Power Act was enacted, it is unlikely that water laws regulating the natural flow of a stream would have been viewed as laws relating to "in-stream uses." See Pet. 10. For these reasons, as *First Iowa* found, it is most plausible to construe the laws saved by Section 27 as limited to those giving rise to proprietary rights.

In contrast, petitioner's construction would render the phrase "used in irrigation or for municipal or other uses" entirely superfluous. It would preserve any state law regulating any use of water that had any impact on a proposed hydropower project, including state statutes regulating hydropower projects identical to the one struck down in *First Iowa*. Under petitioner's view, all such statutes would be considered laws relating to the use of water "for power uses." See Pet. Br. 10. Although petitioner's argument is focused on California's water law and the order of the Water Control Board designed to provide additional protection for fish, its interpretation would not be limited to

[8] In *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954), the Court noted that its interpretation of Section 27 "is applicable to proprietary water rights for power purposes as well as those for other proprietary uses," and it noted that any statements to the contrary in *Alabama Power Co.* were "not controlling." Contrary to petitioner's suggestion (Pet. Br. 10), *Niagara Mohawk* does not suggest that state regulation of the use of water for power purposes – beyond laws respecting proprietary interests – are preserved by Section 27. Indeed, by reaffirming the limitation to laws establishing "proprietary" rights, *Niagara Mohawk* suggests the exact opposite.

regulatory schemes of the type that California has adopted – or to orders purporting to advance environmental goals. Petitioner's interpretation would also extend to restrictions that States might seek to impose on interstate navigable waters, regardless of whether the statutes were based on considerations in conflict with those that Congress specified should govern hydropower development. The sweep of that interpretation and its failure to afford any significance to the qualifying language that this Court emphasized in *First Iowa* weigh heavily against petitioner's position.

2. In addition to its focus on the specific language of Section 27, *First Iowa* correctly concluded that its interpretation of Section 27 was "thoroughly consistent" with the basic statutory plan created by other provisions of the Act – *i.e.*, "with the integration rather than duplication of federal and state jurisdictions under the Federal Power Act." 328 U.S. at 176. Section 27 is a savings clause, and thus its interpretation should reflect its role in the Federal Power Act "as a whole," *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987). As in *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987), it would be incongruous to conclude that "Congress intended to undermine [a] carefully drawn statute through a general savings clause."[9] Accordingly, Section 27's interpretation should be "guided by the goals and policies of the Act," based upon a review of the statute "as a whole," as well as "its purposes and history." 479 U.S. at 493.

Under the Federal Power Act, the Commission has been given broad authority to oversee the development of the Nation's water power resources. *FPC* v. *Tuscarora Indian Nation*, 363 U.S. 99, 118 (1960). As this Court has observed, *FPC* v. *Union Electric Co.*, 381 U.S. 90, 98 (1965), the "central purpose" of the Act is "to provide for the comprehensive control over those uses of the Nation's water resources in which the

[9] See *Mansell* v. *Mansell*, 109 S. Ct. 2023, 2027-2031 (1989); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 220-221 (1986). See also *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) ("In expounding a statute," the Court should "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

Federal government had a legitimate interest." Accord *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958).

The Commission's authority to issue and condition licenses is at the heart of this program. Under Section 4(e), 16 U.S.C. 797(e), FERC is authorized to issue licenses for hydropower projects within the scope of the Act.[8] When it acts upon an application for a license, the Commission is required by Section 10(a) to consider whether and to what extent a project will represent a prudent use of water power resources, taking account not only of the waterway's hydropower potential but also other "beneficial public uses." Under the present statute, the considerations that the Commission is expressly obligated to consider include "the use or benefit of interstate or foreign commerce," "the improvement or utilization of water-power development," "the adequate protection, mitigation, and enhancement of fish and wildlife," and other "beneficial uses, including irrigation, flood control, water supply, and recreational and other purposes." 16 U.S.C. 803(a).[9]

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[8] Congress enacted the Federal Water Power Act, ch. 285, 41 Stat. 1063, in 1920. That statute was reenacted with some modifications as Part I of the Federal Power Act of 1935, 16 U.S.C. 791a-823. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 91 n.2 (1965). One of the most important of these modifications was the extension of the Act to all waters subject to regulation under the Commerce Clause. See also *First Iowa*, 328 U.S. at 172 n.17. Although the 1935 amendments expanded the Commission's jurisdiction in some respects, they did not materially alter the relationship among the provisions at issue here. Accordingly, in general, our citations are to the 1935 Act.

[9] Closely related to Section 10(a) is Section 7(a), 16 U.S.C. 800(a). As amended in 1935, Section 7(a) requires the Commission to give preference to an application of a State or municipality if its plans "are deemed by the Commission equally well adapted * * * to conserve and utilize in the public interest the water resources *of the region*." 16 U.S.C. 800(a) (emphasis added). Likewise, as between other applicants, the Commission may give preference to the applicant whose plans the Commission "finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources *of the region*." *Ibid.* These provisions confirm that the interests that the Commission considers transcend those of any particular State.

The committee reports accompanying the 1935 amendment to Section 7(a), 16 U.S.C. 800(a), stated that its purpose was to "make clear the broad objective of the Act to secure Commission control over all subjects involving the

These are matters of national or regional significance which may not be fully reflected in the water law of a single State. For instance, the objective of improving waterways "for the use or benefit of interstate or foreign commerce" is a uniquely national concern. Indeed, given the scope of any particular project, the beneficial use issues that the Commission must also consider – water-power development, irrigation, flood control, water supply, recreation, and the environment – may affect one or more States.[10]

In the case of streams traversing federal public lands, the Commission must consider the effect of a project on property owned by the United States. Because the government has the option to recapture a private project at the expiration of the license term, the terms of the Commission's licenses shape projects that may eventually become property of the United States. 16 U.S.C. 807(a). In fact, the Federal Power Act confers on the Commission the task of assessing the nature of the projects that the federal government should itself undertake. 16 U.S.C. 800(b).

Also of national concern are the relative merits of using hydropower to satisfy demand for electricity, as opposed to

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development of the Nation's water resources." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 24 (1935); S. Rep. No. 621, 74th Cong., 1st Sess. 44-45 (1935).

[10] On a number of occasions, the Commission has been called upon, with respect to projects affecting more than one State, to weigh interests in developing power resources and protecting the environment. *E.g.*, *New England Power Co.*, 5 F.E.R.C. ¶ 61,019 (1978); *Holyoke Water Power Co.*, 42 F.E.R.C. ¶ 62,166 (1988); *Holyoke Water Power Co.*, 42 F.E.R.C. ¶ 62,343 (1988) (orders requiring construction of fish passage facilities at existing projects on the Connecticut River in cooperation with the Fish and Wildlife Service and agencies of four affected States). See also *P.U.D. No. 1 of Chelan Co., Wash.*, 34 F.E.R.C. ¶ 63,044 (1986); *P.U.D. No. 1 of Chelan Co., Wash.*, 46 F.E.R.C. ¶ 61,033 (1989). In some instances, projects licensed by the Commission extend across state lines or lie on international borders. *Washington Water Power Co.*, 10 F.P.C. 657 (1951); *Susquehanna Power Co.*, 19 F.E.R.C. ¶ 61,348 (1982); *Power Authority of the State of New York*, 12 F.P.C. 172 (1953). The Commission has also exercised its authority to direct hydropower development by coordinating its consideration of licensing proposals in a river basin as a unit. *E.g.*, *Allegheny Electric Coop.*, 48 F.E.R.C. ¶ 61,363 (1989); *Noah Corp.*, 48 F.E.R.C. ¶ 61,354 (1989); *City of Jackson, Ohio*, 48 F.E.R.C. ¶ 61,355 (1989).

alternative sources of energy such as coal, domestic or imported oil, and nuclear energy—each of which presents important environmental and economic issues. When Congress empowered the Commission to issue licenses and charged it with responsibility to consider a wide range of water resource issues, it clearly intended that the Commission's judgments would be put into action in the development of the Nation's water power resources.[11]

The nature of the Commission's licensing authority supports an interpretation of Section 27 that, in the words of *First Iowa*, would avoid "futile duplication of two authorities over the same subject matter." 328 U.S. at 171. Sections 4(e) and 10(a) place "responsibility squarely upon" the Commission and vest the Commission with "final authority" to authorize hydropower projects. 328 U.S. at 168. Given the nature of the Commission's affirmative authority to determine when and under what conditions a hydropower project will serve the public interest, "[a] dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable." *Ibid.*; see *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20, 22-23 (1952). Cf. *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981).

Under the interpretation adopted in *First Iowa*, Section 27 assures "reasonable regulation of the use of" water power resources, and yet avoids the intrusion on state rights that would come about by "seiz[ing], abolish[ing], or eliminat[ing] water rights without compensation merely by force of the Act itself." *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251, 252 (1954). See *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369, 378-379 (1930). To construe the statute in the manner petitioner suggests, in contrast, would "imput[e] to Congress a

[11] The Act contemplates that when an applicant obtains a license, it will promptly build the project in accordance with the license terms. The grant of any license is "conditioned upon acceptance by the licensee of all of the terms and conditions of * * * [the Act] and such further conditions, if any, as the Commission shall prescribe." 16 U.S.C. 799. Once accepted, the terms of the license may not be altered except upon mutual agreement between the licensee and the Commission. *Ibid.* The licensee is required to commence and complete construction in a timely fashion. 16 U.S.C. 806.

purpose to paralyze with one hand what it sought to promote with the other." *American Paper Institute* v. *American Electric Power Service Corp.*, 461 U.S. 402, 421 (1983).

3. Provisions of the Act that enable States, in the course of the licensing process, to present their concerns to the Commission also weigh heavily against an interpretation of the statute that would allow States to impose regulatory requirements on hydropower projects incompatible with the Commission's licensing judgments. When it passed the Federal Water Power Act in 1920, Congress provided for notice to States and local governments whose interests would be affected by a proposed project. Under Section 4(f), 16 U.S.C. 797(f), the Commission must give prompt written notice of an application for a preliminary permit to "any State or municipality likely to be interested in or affected by such application." The same notice is required of any application for a license that has not been preceded by a preliminary permit. 16 U.S.C. 797(e).

In later amendments, Congress has elaborated on this aspect of the statutory scheme. Section 308(a) of the Act, 16 U.S.C. 825g(a), which was enacted in 1935, provides that "[i]n any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, [or] municipality." Agencies that take advantage of this opportunity enjoy the procedural rights prescribed by the Administrative Procedure Act and the opportunity for judicial review. See 16 U.S.C. 825*l*; *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 336-341. In addition, ECPA now requires the Commission to solicit and, if consistent with the purposes of the Act, to incorporate in its licenses the recommendations of state and local agencies. See pp. 24-26, *infra*. Although these statutory provisions postdate the enactment of Section 27, they are fairly viewed as elaborations on the basic statutory pattern enacted in 1920; they are, therefore, relevant to the determination of Section 27's role in the statute viewed as a whole.

The procedural provisions of the Act, in its initial form and as amended, thus channel the views of interested state agencies through the Commission's licensing process. The Act's procedural provisions buttress the conclusion that follows from the

nature of the Commission's substantive responsibilities: the Commission is ultimately to determine what hydropower projects will best serve the considerations committed to its judgment by the Federal Power Act—with the benefit of the view of agencies whose interests are affected by the project.[12]

C. No Intervening Event Would Justify Overruling *First Iowa*

The principle of *stare decisis* strongly supports adherence to the interpretation of Section 27 adopted in *First Iowa*. As this Court observed in *Square D Co.* v. *Niagara Frontier Tariff Bur.*, 476 U.S. 409, 424 (1986), there is a "strong presumption of continued validity that inheres in the judicial interpretation of a statute" and this Court is "especially reluctant to reject this presumption in an area that has seen careful, intense and sustained congressional attention." Thus, although "any departure from the doctrine of *stare decisis* demands special justification," "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989).

This Court has affirmed the validity of *First Iowa* on a number of occasions, and it has been faithfully applied by state and lower federal courts. No decision of which we are aware has questioned *First Iowa*'s validity. With its passage of ECPA in 1986, Congress acted in reliance on the statutory plan that this Court outlined in *First Iowa*. Finally, this Court's decision in *California* v. *United States*, 438 U.S. 645 (1978), did not address or undercut the basis for *First Iowa*. Under these circumstances, petitioner's arguments against this long-settled understanding of the statutory scheme should be addressed to Congress.

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[12] Where the Commission is obligated to include conditions prescribed by another agency in a license, the Act so specifies. A license for a project within a federal reservation must "contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." 16 U.S.C. 797(e). Where a project will affect the navigable capacity of any navigable waters, no license may issue until the plans have been approved by the Chief of Engineers and the Secretary of the Army. *Ibid.*

1. The Court has specifically reaffirmed *First Iowa*'s construction of the Federal Power Act. In *Oregon* v. *FPC*, 211 F.2d 347 (9th Cir. 1954), the State of Oregon and other parties challenged the Commission's issuance of a license for a project on reserved lands; they argued that the project inadequately protected anadromous fish and that the licensee was required to comply with state law on that subject. The Ninth Circuit held that the Commission lacked authority to license a hydropower project to "use the waters of the Deschutes River either at the site of the power dam or elsewhere, contrary to Oregon state law." 211 F.2d at 354. The Commission was entitled, the court of appeals concluded, only to issue a "*permissive license*," not "a license purporting to grant the complete legal right to the construction and operation of the whole project." *Ibid.*

This Court reversed, noting that like *First Iowa*, the case "illustrate[d] the integration of the federal and state jurisdictions under the Federal Power Act." *FPC* v. *Oregon*, 349 U.S. 435, 437 (1955). After rejecting the State's objections based upon the Constitution and the Desert Land Act, the Court stated, with citations to *First Iowa* and Section 27 (349 U.S. at 444-445):

> There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others. [footnote quoting Section 27 omitted]. To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision.[13]

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[13] Justice Douglas's dissenting opinion agreed that although a State could demand compensation for the loss of any water power rights of which it was deprived by a federally licensed project, it "could not assert its regulatory powers to defeat the federal program, for the Supremacy Clause would prevent her." 349 U.S. at 453 n.1.

Since then, this Court has cited or referred with approval tc *First Iowa* on a number of occasions.[14] State and federal courts have also faithfully applied *First Iowa*'s reasoning, concluding that federal licensees are not obligated to comply with state laws imposing requirements inconsistent with the Federal Power Act.[15] To our knowledge, the validity of *First Iowa*'s explanation of the Federal Power Act's "integration of federal and state jurisdictions" and of Section 27's role in that scheme has not been questioned in any decision.

2. Nor has Congress seen fit, in the nearly 45 years since *First Iowa* was decided, to overturn that decision. To the con-

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[14] In *New England Power Co* v. *New Hampshire*, 455 U.S. 331, 338-339 n.6 (1982), the Court stated:

> Whatever the extent of the State's proprietary interest in the river, the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government, • • • which has licensed New England Power. • • • New Hampshire's purported 'ownership' of the Connecticut River therefore provides no justification for restricting or conditioning the use of these federally licensed units. See *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152 (1946).

See also *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 334; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 223 n.34 (1983); *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *Sperry* v. *Florida*, 373 U.S. 379, 385 & n.4 (1963); *City of Chicago* v. *Atchison T. & S.F.R.R.*, 357 U.S. 77, 90 (1958); *Rice* v. *Board of Trade*, 331 U.S. 247, 255 (1947); *Rice* v. *Santa Fe Elevator Co*, 331 U.S. 218, 234 (1947).

[15] *E.g.*, *Pennsylvania Dep't of Environmental Resources* v. *FERC*, 868 F.2d 592, 598 (3d Cir. 1989); *Mega Renewables* v. *County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986); *Town of Springfield* v. *McCarren*, 549 F. Supp. 1134, 1154-1157 (D. Vt. 1982), aff'd, 722 F.2d 728 (2d Cir.), cert. denied, 464 U.S. 942 (1983); *Town of Springfield* v. *Vermont Environmental Board*, 521 F.Supp. 243, 248-250 (D. Vt. 1981); *de Rham* v. *Diamond*, 32 N.Y.2d 34, 295 N.E. 2d 763, 767-768 (1973); *Oregon* v. *Idaho Power Co.*, 211 Ore. 284, 312 P.2d 583 (1957); *City of Tacoma* v. *Taxpayers of Tacoma*, 43 Wash. 2d 468, 262 P.2d 214 (1953). See also *California* v. *Oroville-Wyandotte Irrigation Dist.*, 411 F. Supp. 361 (E.D. Cal. 1975), aff'd, 536 F.2d 304 (9th Cir.), cert. denied, 429 U.S. 922 (1976). Cf. *National Fuel Gas Supply Corp* v. *Public Service Comm'n*, No. 89-7458 (2d Cir. Jan 24, 1990), slip op. 15-16 (noting, in case under the Natural Gas Act and Natural Gas Pipeline Safety Act, the burdensome procedural consequences of piecemeal state regulation duplicating federal regulation).

trary, in 1986, Congress passed legislation elaborating on the statutory scheme outlined in *First Iowa*. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243.

Three provisions of ECPA are directly relevant to the question at hand. First, as amended by ECPA, the Federal Power Act now requires the Commission to give "equal consideration" to the environmental consequences of a project, including "the protection, mitigation, of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," 16 U.S.C. 797(e), and to include conditions in each license "for such protection, mitigation, and enhancement," 16 U.S.C. 803(j)(1). Second, those conditions must be based on recommendations received from federal authorities and "State fish and wildlife agencies." 16 U.S.C. 803(j)(1). If the Commission believes that a recommendation is inconsistent with the purposes of the Act, it must attempt to resolve the inconsistency and, failing that, publish findings explaining why the state or federal agency's recommendation is inconsistent with the Act and why the conditions selected by the Commission comply with the goal of protecting and enhancing fish and wildlife. 16 U.S.C. 803(j)(2). Third, in discharging its responsibility to ensure that a hydropower project is best adapted to a comprehensive plan for improvement of a waterway, the Commission is now specifically directed to "consider" (i) the extent to which the project would be consistent with any comprehensive plan for the waterway prepared by a state or federal agency and (ii) the "recommendations" of federal and state agencies exercising administration over flood control, navigation, irrigation, recreation, and cultural and other relevant resources of the State in which the project is located. 16 U.S.C. 803(a)(2)(A)-(B). The Act also requires the Commission to solicit recommendations from those agencies "for proposed terms and conditions for the Commission's consideration for inclusion in the license." 16 U.S.C. 803(a)(3).

These amendments build upon the basic plan that this Court discerned in the Federal Power Act—"a dual system involving the close integration of [state and federal powers] rather than a futile duplication of two authorities over the same subject mat-

ter." *First Iowa,* 328 U.S. at 171.[16] State, federal, and regional concerns are channeled, in the form of recommendations, through the Commission's licensing process. The Commission is obligated to consider those recommendations and give them due weight, but it is the Commission that enjoys the final authority, subject to judicial review, to determine whether and on what terms a license should be granted.[17] It is very unlikely that Congress would have directed the Commission, numerous state and federal agencies, and courts called upon to provide judicial review to adhere to these detailed procedures if it had believed that a state agency could effectively annul the result.[18]

3. This Court's decision in *California* v. *United States, supra,* does not justify abandonment of *First Iowa.* See Pet. Br. 12-17, 37-38. In *California* v. *United States,* this Court held that Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat.

[16] Echoing *First Iowa,* the conference report accompanying ECPA made clear that state agencies were not to have a "veto" over a Commission licensing determination (H.R. Rep. No. 934, 99th Cong., 2d Sess. 23 (1986)):

> Section 10(j) does not give such agencies a veto, nor does it give them mandatory authority, * * *
>
> Under new section 10(j), FERC is empowered to decide license terms and conditions, but there is a guarantee that the recommendations of the agencies cannot be lightly dismissed. FERC is not required to adopt recommendations that are inconsistent with any other purpose of the Federal Power Act as expressed in section 4(e).

See *id.* at 22, 30.

[17] By contrast, Section 30 of the Federal Power Act, 16 U.S.C. 823a—a provision enacted in 1978 that authorizes the Commission to grant exemptions from its licensing requirements for certain small power projects of 15 megawatts or less—requires the Commission to consult with federal and state fish and wildlife agencies and to include in an exemption such terms and conditions as those agencies determine are "appropriate to prevent loss of, or damage to" fish and wildlife resources of the State in which the project is to be located. 16 U.S.C. 823a(c)

[18] Section 17(a)(1) of ECPA, 100 Stat. 1259, provides that the Act shall not "affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource." This section in consistent with the understanding implicit in the remainder of the Act—*i.e.*, that the division of state and federal authority under the Federal Power Act as amended would remain as this Court had described it in *First Iowa.*

390, requires the Secretary of the Interior to comply with state law when appropriating and distributing water in connection with a federal reclamation project unless compliance with such laws would be "inconsistent with clear congressional directives regarding the project." 438 U.S. at 672. Petitioner argues that "[s]ince *California* holds that section 8 [of the Reclamation Act] requires federal reclamation projects to comply with state regulatory water laws, and since section 27 [of the Federal Power Act] was modeled after section 8, section 27 similarly requires hydropower projects to comply with such state laws." Pet. Br. 14.

There are several flaws in this syllogism. At the outset, although Section 8 and Section 27 employ similar language, there are material differences between them. Section 8 provides that "the Secretary of the Interior, in carrying out the provisions of [the Reclamation Act], *shall proceed in conformity with [state] laws* * * *." 32 Stat. 390 (emphasis added). In *California* v. *United States,* 438 U.S. at 674-675, this Court placed substantial emphasis on that language. There is no comparable directive, either to the Commission or an applicant for a federal license, in the Federal Power Act. Indeed, this Court made clear in *First Iowa* that Section 9(b) of that Act, the only potential counterpart to the "in conformity" language of the Reclamation Act, "does not itself require compliance with any state laws." 328 U.S. at 177.[19]

In addition, the Court in *California* v. *United States* attributed "controlling significance" to the fact that, under the Reclamation Act, the Secretary of the Interior was required "to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." 438 U.S. at 665. As the House Report had stated, the Secretary of the Interior could not take any action in appropriating state waters of the state streams

[19] Petitioner refers (Pet. Br. 12 n.11) to a 1964 Senate report collecting 37 statutes reflecting deference to state water law. The three statutes that contain language most similar to that of Section 27 are: Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 390; Section 11 of the Hetch Hetchy Act (Act of Dec. 19, 1913), ch. 4, 38 Stat. 250-251; and Section 4 of the Act of July 2, 1956, ch. 375, 69 Stat. 368-369, which relates to reclamation. Unlike the Federal Power Act, however, all three include the "in conformity" language.

"which could not be undertaken by an individual or corporation if it were in the position of the Government as regards the ownership of its lands." *Id.* at 665 (quoting H.R. Rep. No. 794, 57th Cong., 1st Sess. 7-8 (1902)). In contrast, Section 21 of the Federal Power Act specificially confers a federal right of eminent domain upon any licensee of a water power project deemed by the Commission to be "desirable and justified in the public interest." 16 U.S.C. 814. In this critical respect, then, the relative balance that Congress struck between state property rights and federal powers is significantly different under the two Acts.

More broadly, *California* v. *United States* expressly holds that state law need not be followed when there is a "clear congressional directive" to the contrary. 438 U.S. at 672. The Federal Power Act, as amended by ECPA, contains just such a directive: the provisions of Section 4(e) and Section 10(a) requiring FERC to determine, after receiving appropriate recommendations from affected state agencies, whether a proposed federal water power project is in the public interest. *California* does not suggest that a clear delegation of authority to a federal agency is any less deserving of protection from an inconsistent state law than any other type of "clear congressional directive." Just as Section 8 cannot be construed to contradict a substantive provision in the Reclamation Act (see 438 U.S. at 668-669 n.21, 672 n.25), Section 27 should not be held to undercut the effectiveness of the Federal Power Act's delegation of authority to the Commission to direct the course of hydropower development.

In short, there are significant distinctions between Section 8 of the Reclamation Act and Section 27 of the Federal Power Act, and, even if these distinctions were not alone sufficient to distinguish *California,* the Commission's licensing authority could properly be preserved within the qualification to the holding in that case for express congressional directives. In this regard, we note that the Court's opinion in *California* did not refer to *First Iowa,* leaving open the question of how the Court's reasoning would bear on the Federal Power Act.[20] Thus, neither

[20] In its Reply Brief in *California* v. *United States*, petitioner noted that Sections 9(b) and 27 of the Federal Power Act, unlike Section 8 of the Reclamation Act, "do not require the [Commission] to 'proceed in conformity with state laws.'" Petitioner also suggested that *First Iowa* had "properly rejected" the argument that a State could exercise a veto power over a hydropower project, "ruling that the federal government has exclusive authority to license the construction and operation of such projects." Reply Brief for the Petitioners at 16-17 & n.3, *California* v. *United States, supra.* Our brief in that case argued that the government's interpretation of the Reclamation Act was consistent with cases interpreting "similar provisions in other statutes," that the "closest analogous case" was *First Iowa*, and that Section 27 was "similar to Section 8 of the Reclamation Act, but broader." Brief for the United States at 51-54 & nn. 30-31, *California* v. *United States, supra*; see *id.* at 128-129.

the holding nor the reasoning of *California* v. *United States* requires abandonment of *First Iowa*'s authoritative interpretation of the Federal Power Act.

Petitioner also argues that its construction of the Federal Power Act is necessary to avoid anomalies in this area. See Pet. Br. 15-17. In its view, hydropower projects are private, profit-oriented ventures serving "more local goals" than federally funded reclamation projects and thus Congress must have intended to subject the former to all state water laws. *Id.* at 16. We disagree. It is untenable to suggest that Congress, which struggled with hydropower legislation for almost a decade before enacting the Federal Power Act, viewed the matter as one of primarily private or local concern. See *First Iowa,* 328 U.S. at 180 & n.23. Deficiencies in the Nation's efforts to develop its hydropower resources were viewed as an issue of pressing national importance; the fact that Congress chose, understandably, to rely primarily on the private sector to develop the country's numerous hydropower sites, under the Commission's oversight, does not suggest any lack of interest in the course of development.

Hydropower remains an issue of national importance today, particularly in view of concern for renewable sources of energy and the environment. The Commission has issued 1077 licenses for terms up to 50 years for hydropower projects representing about 52 million kw of capacity. These projects produce about five percent of the Nation's electrical energy needs—the equivalent of approximately 340 million barrels of oil per year. Indeed, in recent years, Congress has sought to reduce the demand for

fossil fuels by encouraging small power production facilities. See *FERC* v. *Mississippi*, 456 U.S. 742, 750, 756-757 (1982). Very recently, as a result of the President's directive to the Secretary of Energy to develop a comprehensive strategy, the Department of Energy has announced a new conservation policy designed to reduce oil consumption and the threat of global climate change. This policy includes an initiative under which DOE will work with FERC, other federal agencies, and the States to streamline the regulatory process, including licensing procedures. These efforts demonstrate the continuing importance of ensuring a vigorous federal presence in directing the development of the nation's hydropower resources.

D. The Background and Legislative History Of The Federal Power Act Do Not Provide Any Basis For Overruling *First Iowa*

In *First Iowa*, this Court specifically referred to the legislative history of Section 27 in concluding that that provision applies only to state laws recognizing proprietary rights. 328 U.S. at 176 & n.20. The doctrine of *stare decisis* weighs heavily against upsetting this settled interpretation based only upon a further review of legislative history. See *Patterson* v. *McLean Credit Union*, 109 S. Ct. at 2370 ("In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either judicial doctrine or further action taken by Congress."). But in any event, the legislative history of the Federal Power Act does not support petitioner's interpretation of the statute.[21]

Petitioner's account of the lengthy process leading to enactment of the Federal Water Power Act of 1920 omits or distorts significant elements of the Act's history. While petitioner recounts the history of statutes in which Congress deferred to state water law (Pet. Br. 18-22), it ignores the emerging awareness, in the period immediately preceding the enactment of the Federal Water Power Act, of federal authority over the Nation's

[21] The history of the Federal Water Power Act is recounted in Pinchot, *The Long Struggle for Effective Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945), and J. Kerwin, *Federal Water-Power Legislation* 171-263 (1926).

water power resources and the need for a national solution to problems posed by hydropower development. Moreover, petitioner indiscriminately marshals statements favorable to its position from legislative materials, but makes no effort to relate those statements to the particular bills or amendments that were being debated or to identify the speaker's interest in the matter being considered. Viewed in proper context, those statements do not have the significance petitioner suggests.

1. Congress enjoys broad authority under the Commerce Clause and the Property Clause to regulate the use of water resources. See *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940); *FPC* v. *Oregon*, 349 U.S. at 442-443. Recognition of this authority, coupled with a growing awareness of the need for federal regulation, were important elements in the history of federal water power legislation. A milestone in that history was President Theodore Roosevelt's vetoes of two bills that would have authorized construction of hydropower dams across the Rainey and James Rivers. *FPC* v. *Union Electric Co.*, 381 U.S. at 98-99 n.11. Both veto messages insisted on the enactment of legislation establishing a federal policy for comprehensive hydropower development. S. Doc. No. 438, 60th Cong., 1st Sess. (1908); H.R. Doc. No. 1350, 60th Cong., 2d Sess. (1909). With the second of these messages, President Roosevelt provided Congress with a lengthy memorandum from the Solicitor General expressing the opinion that such a policy could constitutionally be implemented by means of conditions on grants of permission to build projects on navigable waterways. H.R. Doc. No. 1350, *supra*, at 16-25.

Thereafter, in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62 (1913), the Court confirmed the breadth of Congress's authority over navigable waterways. The Court stated that Congress's power to regulate commerce (*id.* at 63)

> comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public prop-

erty of the nation, and subject to all the requisite legislation by Congress.[22]

In 1913, when it enacted the Hetch Hetchy Act, Congress employed the conditional grant technique in order to impose restrictions on a water project in a national park. Act of Dec. 19, 1913, ch. 4, 38 Stat. 242. The Hetch Hetchy Act granted the City of San Francisco permission to build a dam in Yosemite National Park to provide the City with water for municipal uses. The grant was subject to various conditions, one of which required the City to maintain prescribed minimum flows to the Modesto and Turlock Irrigation Districts in accordance with their vested water rights. The Act also contained a savings clause similar to Section 27 of the Federal Water Power Act. § 11, 38 Stat. 250-251.[23] Notwithstanding claims that the legislation overstepped constitutional limitations on Congress's power and infringed upon state sovereignty over water resources, see 50 Cong. Rec. 4108, 4109, 4111 (1913) (remarks of Rep. Mondell), the legislation was enacted.

The Hetch Hetchy Act represented an important step toward recognizing a federal regulatory role in the development of water power resources.[24] There would continue to be disagreement—not, as petitioner suggests, unanimity—regarding the appropriate roles of the federal government and the States in this area. However, with the passage of the Hetch Hetchy Act, ma-

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[22] In *Chandler-Dunbar*, the issue was whether the government could be required to compensate a power company for the value of water power rights in a navigable stream. The Court held that no compensation was due. The Federal Power Act does not, however, purport to extinguish property rights without compensation. See *FPC* v. *Niagara Mohawk Power Corp., supra*.

[23] On the floor of the House, Representative Ferris of Oklahoma stated that the purpose of the savings clause was to make clear (50 Cong. Rec. 4112 (1913)):

> that the Federal Government does not intend to interfere with the prescribed and vested rights of these irrigation people.

[24] See *Hearings on H.R. 14,893 Before the House Comm. on Public Lands*, 63d Cong., 2d Sess. 152-153 (1914) (testimony of Gifford Pinchot) (referring to the implications of the *Chandler-Dunbar* case and the Hetch Hetchy Act for federal water-power legislation).

jorities of both Houses recognized the authority on which federal water power legislation would ultimately be based.

2. Between 1914 and 1920, a series of water power bills were introduced in both Houses of Congress. Until 1918, navigable waters and public-land waterways were addressed in separate bills.[25] Petitioner relies principally on the public-land bills, none of which contained a grant of broad authority, comparable to Section 10(a) of the present Act, empowering a federal commission to oversee the comprehensive development of water resources. The speakers on those bills thus had no occasion to address the critical point at issue here—the relation between the Federal Power Act's delegation of authority to the Commission to oversee water power development and Section 27's reservation of authority to the States. The most significant element of these debates, for present purposes, was the emergence of two alternative versions of the savings clause—a broad version that was to be abandoned and the narrower version ultimately enacted.

a. The *Ferris Bill*. Petitioner relies heavily on debate over the Ferris bill of 1914, H.R. 16,673, 63d Cong., 3d Sess. (1914). Pet. Br. 23-27. As petitioner notes, when it was reported to the floor of the House, this bill contained a savings clause (Section 14) identical to what would become Section 27 of the Federal Water Power Act. H.R. Rep. No. 842, 63d Cong., 2d Sess. 4 (1914). In his section-by-section analysis of the bill, not cited in petitioner's brief, Representative Ferris of Oklahoma explained that the purpose of that provision was as we suggest—*i.e.*, to "disclaim[ ] any intention on the part of the Federal Government to interfere with vested rights or the State laws with reference to water rights or the appropriate distribution of water used for irrigation or municipal purposes." 51 Cong. Rec. 13,625 (1914). Thereafter, he expressed the view that any adequate water power bill should provide that the "Federal Government should at all times maintain its paramountcy and full control." *Ibid.*

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[25] See *Chemehuevi Tribe of Indians* v. *FPC*, 489 F.2d 1207, 1220 n. 61 (D.C. Cir. 1973), rev'd, 420 U.S. 395 (1975); J. Kerwin, *supra*, at 171-216.

Representative Mondell of Wyoming rose to *oppose* the bill, on the ground, among others, that Section 14 inadequately protected state prerogatives. 51 Cong. Rec. 13,630 (1914). His remarks were emphatically not—as petitioner's extensive quotations suggest (Pet. Br. 23-24)—an explanation of Section 14's meaning. Indeed, he expressed the position that the savings clause was not broad enough to protect the conception of state water law for which he argued in the passages quoted in petitioner's brief. In that connection, he contended that although there were similarities between the savings clauses in the Reclamation Act and the Ferris bill, the federal authority contemplated by the Ferris bill made its savings clause inadequate. Accordingly, he maintained that the Ferris bill should be amended to delete provisions that he believed would infringe upon exclusive state control over water and to broaden the savings clause.[26]

In keeping with his view that Section 14 inadequately protected state interests, Representative Mondell later offered an amendment that would have expressly conditioned a lease of federal public lands for a hydropower project on the acquisition of state water rights. 51 Cong. Rec. 13,815 (1914). Though he was careful to suggest that the Ferris bill might effectively require the same result, he contended that the amendment was

[26] Representative Mondell noted that Section 14 was "somewhat similar" to Section 8 of the Reclamation Act, but he argued that it was inadequate in the context of the power bill. 51 Cong. Rec. 13,631 (1914). While, in Representative Mondell's view, there was nothing in the Reclamation Act that "need raise the question of the right of a State to control the use of water," he apparently understood the power bill to be different in this respect. Thus, he argued that some provisions of the Ferris bill "should go out" and also advocated broadening the savings clause (*ibid.*):

> It would also be well if this provision of the bill could be broadened as to clearly express the fact that nothing contained in this legislation should, and nothing in it can, in fact, interfere with the right of a State to regulate the use of nonnavigable water for all purposes within its boundaries.

See *id.* at 13,631, 14,070 (also arguing for broader savings clause). Representative Mondell had been the principal sponsor of the Reclamation Act, *California* v. *United States*, 438 U.S. at 665, and was thus well qualified to speak to the differences between that Act and the Ferris bill.

necessary to avoid disturbing "the relative jurisdiction of the States and of the National Government." *Ibid.* The amendment provoked a pointed question from Representative Raker of California as to whether it "will practically defeat any leasing of the land for the purposes of the bill." *Ibid.* Representative Ferris stated that if the amendment passed it would be "doubtful if anyone would try to acquire rights in a State to develop water power," *id.* at 13,816, and the amendment was defeated.

Later, the House considered an amendment offered by Representative Mann of Illinois that would have deleted the savings clause altogether. 51 Cong. Rec. 14,066-14,072, 14,139-14,140 (1914). Representative Mann expressed concern that Section 14 could allow States to block hydropower development, suggesting that "the Government may give the right to a company for a lease on a dam site to erect a power plant, and the next year the State may take all the water rights away from the company." *Id.* at 14,066. Representative Taylor of Colorado, identifying himself as the author of Section 14, objected strenuously to the proposed amendment, but stressed Section 14's limits. He maintained that the savings provision was necessary to prevent power companies from diverting water for purposes other than power and emphasized that the savings clause "was put in there because it was necessary to protect the vested water rights of the West and nothing else." *Id.* at 14,067.[27] To

[27] Representative Taylor stated (51 Cong. Rec. 14,067 (1914)) (emphasis added):

> [I]f the gentleman from Illinois does not want to deliberately take away the vested rights of the Western States to the waters which our people can and are now using for irrigation of their growing crops, he would not offer this kind of an amendment. We know full well, and much better than he does, what it would mean to pass this bill without this section 14 in it. Practically every drop of the natural flow of the waters of every stream in every Western State today is appropriated and being beneficially used. It is appropriated by our citizens and under our State laws. It is appropriated under the Constitution of the United States and the constitution of our own States, and under the acts of Congress of 1866 and 1872. That water now is going to be hereafter allowed to be used by big and little power companies for power purposes.
>
> *We are not objecting to its being used for power purposes.* It does not diminish the water as it falls down the mountain side and turns a wheel.

be sure, the Mann amendment also provoked statements construing Section 14 more broadly, but these cannot fairly be taken as authoritative expressions of the intent of the bill.[28]

The House returned to the Mann amendment several days later and disposed of it by adopting a *broader* version of the savings clause. Representative Taylor, who had earlier assured Representative Mann that Section 14 was designed only to protect vested rights, offered an amendment to Section 14 striking all of its language after the word "water," saying that this change would make the section "much broader than it is now."

> *But if you permit these power companies to take the water out of that stream and divert it from its use for irrigation and disregard the irrigator's rights,* you simply destroy the vested rights of 40 years in the West. It would be a high-handed confiscation of our property rights. That is what it amounts to.
>
> * * * I took this language of section 14 from section 8 of the reclamation law and inserted it in this bill. That was put in there because it was *necessary to protect the vested water rights of the West and nothing else*, and nobody who respects the law or the vested rights of the settlers has ever from that day to this found any complaint with it, nobody has ever said the Government could not construct 32 reclamation projects in the West and operate them by virtue of that section being in there. It simply respects and protects the lawful rights of the farmers and miners and the inhabitants generally of the West.

See also *id.* at 14,071. Petitioner quotes brief excerpts from the same speech (Pet. Br. 24-25), but omits all mention of these passages.

[28] In response to a question from Representative Stevens, Representative Raker stated that "State law would control" in the event that a State had laws "governing the use of water for the development of power, which laws vary materially from the rules and regulations set out in this act." 51 Cong. Rec. 14,070-14,071 (1914). Representative Seldomridge also stated that the bill should provide that "[t]he power company will have to come in and conform to the laws of the State." *Id.* at 14,071. In his view, however, the best way to resolve the "many points of conflict between Federal and State authority" in the bill was to give "to the States the power to regulate and control the development of power companies within their borders, thereby preventing any conflict whatever between the State and the Federal Government." *Ibid.* Especially in view of the more narrow explanations of Section 14's purpose by Representatives Ferris and Taylor, these statements cannot fairly be taken to express the intention of the Congress that enacted the Federal Water Power Act six years later. Compare Pet. Br. 25-27.

51 Cong. Rec. 14,139 (1914).[29] Representative Mann, who had offered the amendment to strike the narrower version of Section 14, agreed to the modification, acquiescing in Representative Taylor's suggestion that it would prevent private interests from monopolizing water in the West. *Ibid.* Representative Mondell, who had earlier objected to Section 14 as too narrow, now argued that the Section's reference to "any vested right acquired therein" should not be deleted. *Ibid.* However, Representative Taylor responded that this could narrow the effect of the amendment. The amendment carried, and the Ferris bill passed the House with Section 14 in that form. However, the bill failed to pass in the Senate.

b. *Later Public Lands Bills.* Both Houses of the next Congress resumed consideration of water power legislation covering projects on public lands, each taking up a version of H.R. 408, 64th Cong., 1st Sess. (1915). Petitioner quotes at length from the committee reports and debates on these bills (Pet. Br. 27-30) without noting a critical fact. As reported, both bills contained the broader version of Section 14 of the Ferris bill that Representative Taylor had described the previous year as "much broader" than the provision which was ultimately to be enacted. See H.R. Rep. No. 16, 64th Cong., 1st Sess. 4 (1916); S. Rep. No. 66, 64th Cong., 1st Sess. 3 (1916). In fact, the very first section of the Senate version of H.R. 408 provided that "no lease [for a hydropower project] shall be granted until the applicant has complied with the laws of the State, States, or Territory wherein such project is to be located, providing for the appropriation of water" needed for the project. S. Rep. No. 66, *supra*, at 1.[30]

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[29] Under Representative Taylor's amendment, Section 14 read:

> Sec. 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.

[30] It is not clear whether, in the colloquy quoted by petitioner (Pet. Br. 29-30), Senators Borah and Myers were referring to this provision or to the savings clause. In the fashion of other dialogues whose purpose may have been to impress a very limited view of Congress's power on the legislative history, these Senators also agreed, in their very next exchange, that the federal government had no constitutional authority to "acquire any interest to the use of the water other than for the purpose of navigation." 53 Cong. Rec. 4204

Moreover, neither of these bills included any provision similar to Section 10(a) of the present Act. Therefore, statements regarding the House and Senate versions of H.R. 408 shed no light on the relationship between Sections 10(a) and 27 of the present law or on the meaning of the critical qualifying phrase that appears in the narrower version of the savings clause, "of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

c. *The Administration Bill and the Passage of the Act.* In the meantime, Congress had also considered separate bills relating to dams on navigable rivers—including the Adamson bill, H.R. 16,053, 63d Cong., 2d Sess. (1914), see 51 Cong. Rec. 11,414-11,415 (1914), and the Shields bill, S. 3331, 64th Cong., 1st Sess. (1915), see S. Doc. No. 322, 64th Cong., 1st Sess. (1916). Each of these bills contained a provision that would have conditioned approval of a dam across a navigable river on a finding, similar to that ultimately contained in Section 10(a), that the project was "best adapted to a comprehensive plan for the improvement of the waterway in question." [31] The Adamson bill passed the House, the Shields bill passed the Senate, but neither achieved passage by both chambers.

In 1918, to break the impasse over water power legislation, President Wilson directed the Secretaries of War, Interior, and Agriculture to draft a single bill covering both navigable waters and waterways on public lands. At the President's request, the

(1916) (remarks of Sen. Borah). This narrow view was not, however, the constitutional understanding that informed the Act. See *United States* v. *Appalachian Power Co.*, 311 U.S. at 426-427.

[31] For example, as it was reported to the floor of the Senate, S. 3331, *supra*, provided in Section 2 that a license for a water power project on a navigable waterway could be issued only upon a finding that the project was "such as in the judgment of the Secretary of War shall be best adapted to a comprehensive plan for the improvement of the waterway in question for the uses of navigation and for the full development of its water power and for other beneficial public purposes, and best adapted to conserve and utilize the water resources of the region in the interests of navigation, the needs of the Government, and the public welfare." See also H.R. 16,053, *supra*, § 3.

In the Senate, this grant of federal authority provoked opposition on the ground that the federal government's role was limited to protecting navigation. 53 Cong. Rec. 2968-2970 (1916) (remarks of Sen. Works).

House created the Joint Water Power Committee, consisting of members of the Committees on Interstate and Foreign Commerce, Public Lands, and Agriculture, which conducted hearings on the bill. *Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess., Pts. 1-4 (1918) [hereinafter *Joint Hearings*]. See J. Kerwin, *supra*, at 217-218.

The Administration bill, H.R. 8716, 65th Cong., 2d Sess. (1918), see H.R. Rep. No. 715, 65th Cong., 2d Sess. 21-29 (1918), was the first to provide for creation of a Commission, then consisting of the Secretaries of War, Interior, and Agriculture, to license hydropower projects on navigable waterways and public lands. With respect to both categories of waters, the Commission was to have authority to license projects that, in its judgment, would best serve the comprehensive development of those waters, taking account of various beneficial uses.[32] Secretary of Agriculture Houston explained the need for this federal authority as follows: "The problems are National rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with National agencies." See H.R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

The Administration bill contained neither the original nor the amended, broader version of Section 14 of the Ferris bill. The Water Power Committee was urged by Representative Mondell to adopt the broader version of the savings clause, but it declined to do so.[33] Instead, the Committee agreed, by an 8-7

[32] During hearings on the bill, O. C. Merrill, Chief Engineer of the Bureau of Forestry in the Department of Agriculture and a principal drafter of the Administration bill, emphasized that although a federal license would apply only to the use of water resources for power, the Commission's judgment would take account of various beneficial uses of water—*i.e.*, of "all uses that can be made of the water and of the site in that particular locality, as a unit." *Joint Hearings* at 95; see *id.* at 93-96.

[33] In the committee hearings on the administration bill, Representative Mondell advocated adoption of the broader version of the savings provision. See *Joint Hearings*, at 619-620. During colloquy on that proposal, Representative Taylor emphasized that such a savings clause reflected an intention not to infringe "covertly or otherwise * * * upon the irrigation vested rights in the State's ownership of the water on the public lands and nonnavigable streams * * *." *Id.* at 640-641. See also *id.* at 641-644. As noted, the committee's action did not conform to Representative Mondell's proposal.

vote, to the narrow version. The bill was then reported as S. 1419, 65th Cong., 2d Sess. (1918). See H.R. Rep. No. 715, 65th Cong., 2d Sess. 13, 21 (1918); 56 Cong. Rec. 9115 (1918) (remarks of Rep. Taylor). This bill passed the House, but was thwarted in the Senate by a filibuster. J. Kerwin, *supra*, at 254. Finally, a substantially identical bill, also containing the narrow version of the savings clause as its Section 27, H.R. 3184, 66th Cong., 1st Sess. (1919), was enacted in 1920.[34]

3. When viewed in its full context, this history will not bear the interpretation petitioner places upon it. What is now Section 27 of the Federal Power Act was the narrower of the two proposed savings clauses included in federal power bills between 1914 and 1920. Many of the statements relied on by petitioner

[34] Petitioner relies heavily on the floor debates on S. 1419 and H.R. 3184 (Pet. Br. 31-34), but those debates do not sustain its position. See 56 Cong. Rec. 9047-9048 (1918) (remarks of Reps. Dewalt and Sims); *id.* at 9110 (remarks of Rep. LaFollette); *id.* at 9113-9115 (remarks of Reps. Mondell, Sloan, Taylor); *id.* at 9901-9903 (remarks of Reps. Taylor, Raker); *id.* at 10,493-10,494 (remarks of Sen. Myers).

First, none of the speakers cited by petitioner came to terms with Congress's adoption of the narrow version of the savings clause, or suggested that the clause was intended to allow States to supersede the exercise of the Commission's authority under Section 10(a). Indeed, Senator Myers drew no distinction between S. 1419 and the much different bill, H.R. 408, *supra*, reported out of his committee; his suggestion that the bills were similar was simply incorrect. Second, the focus of much of the debate was on whether the Federal Power Commission would have jurisdiction to consider the effects on irrigation of a water power project, as Representative Raker advocated, but Representatives Taylor and Mondell opposed. 56 Cong. Rec. 9113-9115, 9901-9903 (1918). The latter representatives' narrow view of the Commission's function – a view totally inconsistent with the role it has since performed – and their correspondingly broad view of the authority reserved to States must be approached with caution. Moreover, as the principal proponents of a broader savings clause than Congress ultimately enacted, Representatives Mondell and Taylor cannot fairly be regarded as spokespersons for the intent of the narrower provision. Third, as petitioner acknowledges, Representative LaFollette's remarks related to Section 9(b) of the Act; referring to other evidence of his views, this Court concluded in *First Iowa* that that Section did not require compliance with State laws. See 328 U.S. at 173-174. As this Court explained in *First Iowa*, the divided authority with which Representative LaFollette was concerned was not limited to federal officials. See 56 Cong. Rec. 9810 (1918).

related to the broad version, which did not pass; others, though directed to narrow provision that was eventually adopted, were delivered by members of Congress who could not fairly be considered spokespersons for that provision. When the bill that ultimately passed was introduced, it did not contain a savings clause; Section 27 was added in committee by an 8-7 vote. Thus, contrary to the impression petitioner seeks to create, Congress was not uniformly committed to the division of authority that petitioner advocates. There were undoubtedly members of Congress who shared petitioner's vision as to the proper scheme of federal water power legislation. But the legislative history does not sustain the argument that such a scheme was enacted. In any event, nothing in this legislative history justifies the Court in abandoning *First Iowa*'s long-settled interpretation of the Federal Power Act's division of authority between the Commission and the States.[35]

II. THE CALIFORNIA WATER BOARD'S MINIMUM FLOW REQUIREMENTS DO NOT CONSTITUTE A PROPRIETARY RIGHT UNDER CALIFORNIA LAW, AND ARE INCONSISTENT WITH, AND THEREFORE PREEMPTED BY, THE COMMISSION'S EXERCISE OF LICENSING AUTHORITY

Under *First Iowa*, Section 27 preserves state laws recognizing proprietary rights in water, but "[i]n those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of state laws by federal legislation take its natural course." 328 U.S. at 176. Two questions are therefore presented for decision: First, does California law recognize a property right in the maintenance of in-stream water flows for the preservation of fish? If so, then the federal licensee must acquire that right, either by purchase or, where appropriate, through an

[35] As petitioner points out, the Commission took the position in its early years that compliance with state law was a condition for issuance of a federal license. Pet. Br. 35-36 n.17. However, as the reports reflect, that view was based principally, if not exclusively, on the belief that Section 9(b) required that result. That position was, of course, abandoned after *First Iowa* interpreted Section 9(b) in a contrary manner, and petitioner does not contend otherwise.

exercise of the power of eminent domain. Second, if the in-stream flow requirements established by the State Water Resources Control Board for this project do not reflect proprietary rights, are they inconsistent with the conditions set forth in the FERC license? If there is no conflict, then "they remain as applicable and effective as they were before [the] passage" of the Federal Power Act. 328 U.S. at 178. But because "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room for conflicting state controls" (*id.* at 181), any state standards that are inconsistent with FERC's exercise of its authority under Section 10(a) of the Federal Power Act are preempted.

A. California Does Not Recognize A Property Right To In-Stream Flows For The Purpose Of Protecting Fish

Under California law, the use of water for the preservation of fish is recognized to be a beneficial use. Cal. Water Code §§ 1243, 1257 (West 1971); see *id.* § 1257.5 (Supp. 1989). The California courts have held, however, that the State will not grant a permit or a license reflecting a right to the maintenance of in-stream flows for that purpose. *Fullerton* v. *California State Water Resources Board*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979); *California Trout, Inc.* v. *State Water Resources Control Board*, 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (1979). The recognition of such a right is foreclosed by a state rule requiring an act of appropriation or diversion of water as an element of an appropriative water right. See *In re Water of Hallett Creek Stream System*, 44 Cal. 3d 448, 454-455 n.2, 749 P.2d 324, 325 n.2, 243 Cal. Rptr. 887, 889 n.2 (1988). The refusal to recognize a right to the maintenance of in-stream flows for fish protection is also necessary, one court has stated, to avoid "[tying] the Board's hands as to future uses." *Fullerton*, 90 Cal. App. 3d at 604, 153 Cal. Rptr. at 528.[36]

[36] Other States have created water rights entitling the owner to the maintenance of continued flows. See *Fullerton*, 90 Cal. App. 3d at 601 n.13 153 Cal. Rptr. at 526 n.13.

Petitioner does not contend that the in-stream flow requirements established by the State Water Board reflect a recognized proprietary right within the meaning of *First Iowa*. Consequently, those in-stream flow requirements cannot be said to create or to protect proprietary water rights protected by Section 27; instead, they represent regulation of the use of water. As such, they are not among the state rights preserved from preemption by the Federal Power Act's savings clause.

B. California's In-Stream Flow Requirement Conflicts With The Federal License And Is Thus Superseded

The dispositive question, therefore, is whether the State Water Board's decision to establish in-stream flow rates higher than those established FERC's license conflicts with the Commission's exercise of its authority under Section 10(a) of the Federal Power Act. It is well established that any assertion of regulatory authority by a State is invalid under the Supremacy Clause if it

> actually conflicts with federal law, that is, [if] it is impossible to comply with both state and federal law, * * * or [if] the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Accord, *e.g.*, *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 581 (1987); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Here, a clear conflict exists between the in-stream flow conditions contained in the FERC license and the state water permit; as a result the federal requirement is controlling under the Supremacy Clause.

1. Contrary to petitioner's contention (Pet. Br. 48-49), in-stream flow requirements established by FERC are not merely " 'minimum' requirements" that leave room for States to impose more stringent standards. Rather, as the Commission explained (Pet. App. A29 (footnotes omitted)):

> [T]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Com-

mission's comprehensive planning and licensing process under Section 10(a). In considering and balancing all aspects of the public interest as we are required to by Section 10(a) in determining whether, and under what conditions, a license should issue, we must balance, *inter alia*, the need to protect environmental interests with the need for the power to be produced by the projects. In so doing, we prescribe conditions, such as those relating to minimum flow releases, that we believe will provide the appropriate level of environmental protection and energy generation and will not issue a license if the conditions we deem necessary to protect environmental resources would render a project economically infeasible.

Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by WRCB, would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state.

This explanation of the purpose of the in-stream flow condition in the Commission's license is entirely consistent with the language of the statute and this Court's decisions.[37] The Commission's assessment of the purpose of its license and the effect of the State's conflicting assertion of its authority is entitled to deference from this Court. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 714-715, 720-722.

Under the circumstances of this case, there can no doubt that the Water Control Board's effort to raise the minimum flow requirements conflicts with the federal Commission's judgment about the appropriate conditions that should attach to the proposed project. Indeed, the Partnership has argued that compliance with the Water Control Board's in-stream flow re-

[37] See *First Iowa*, 328 U.S. at 167-168; *Pacific Gas & Elec. Co* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 223 n.34 (1983).

quirements would render the project economically infeasible. Pet. App. A17. Petitioner's suggestion that it is theoretically possible to comply with both standards at the same time and that no conflict can be found unless the State Board denies a water permit altogether (Pet. Br. 48-49) simply ignores the fact that the higher in-stream flow requirements reduce the amount of water available to generate power and thus undercut the Commission's affirmative judgment as to the best means of developing the hydropower resources at issue. As the Ninth Circuit succinctly stated, the imposition on the Partnership of flow rates that are materially higher than those prescribed in a Commission license "would, in essence create a different type of hydropower project from the one described in the license" and would in effect "constitute a veto of the project that was approved and licensed by FERC." Pet. App. A12.

Petitioner marshals a number of cases in which, it maintains, this Court has approved "concurrent federal and state jurisdiction over activities that affect both national and state interests" (Pet. Br. 40-41 & n.22) or "dual systems" (*id.* at 41). However, these abstract formulations should not be allowed to obscure the real differences between those cases and this one—in terms of the extent of the asserted preemptive effect of federal law, the nature of the claimed conflict, and the purposes the respective laws served. For example, in two of the cases petitioner relies upon, *Cummings* v. *Chicago*, 188 U.S. 410 (1903), and *California Coastal Comm'n* v. *Granite Rock Co., supra*, the Court held only that parties were not relieved entirely from state permit requirements when undertaking federally licensed activities; neither case suggests that a state agency may impose conditions in a permit that effectively nullify the activity approved by the federal license. See 480 U.S. at 593-594.[38]

[38] The other cases that petitioner cites (Pet. Br. 41 n.22) involved federal licensing requirements whose purpose was narrower than that of the Federal Power Act, situations in which the state and federal statutes addressed separate concerns, an insufficient showing of actual conflict between state and federal statutes, or some combination of those factors. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 720-721 (no factual showing of inconsistency between state and federal requirements regarding blood plasma); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. at 211-212 (under Atomic

As the Court has stated, a State "may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963). When it characterized the Commission's in-stream flow requirements as a mere proposal (see J.A. 59), the Water Control Board purported to exercise "a virtual power of review" over the Commission, and it imposed additional, inconsistent requirements on top of those in the federal license. It is clear that the conditions the state board has imposed interfere with the exercise of authority delegated by Congress to the Commission. See *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 155 (1982) (though compliance with federal and state requirements was not impossible, state regulation was nevertheless preempted where it deprived banks of flexibility conferred by federal regulation).

2. Petitioner also contends that giving primacy to FERC's conditions would unduly undercut the States' interests in the comprehensive management of their water resources by "creat[ing] two bodies of law in the same river" and empowering FERC to act as "a super water rights agency." Pet. Br. 43-47. These arguments are overstated and, in the final analysis, are foreclosed by the Federal Power Act.

Energy Act, federal government maintains complete control over safety and nuclear aspects of nuclear plants, reserving to states other issues); *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (Water Quality Improvement Act expressly authorizes States to establish higher safety equipment regulations than those prescribed by the Act); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 147-148 (1963) (federal regulation established only minimum standard); *Kake* v. *Egan*, 369 U.S. 60, 63 (1962) (noting the limited purpose of the federal permits for fish traps); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 445 (1960) (thrust of federal law was perils of maritime navigation, whereas local ordinance was designed to protect health and cleanliness of local community); *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 207 (1944) ("limited and defined control which federal authority has thus far seen fit to assert over customshouse brokers" left room for state foreign corporation law).

As the Commission has often made clear, its authority is limited to authorizing the "use" of water for hydropower projects.[39] Significantly, as in this case, hydropower projects often do not deplete the quantity of water available for other uses. To be sure, hydropower projects can involve the impoundment, release, or diversion of water in ways that affect other uses of water resources. But to the extent that a federal hydropower project will interfere with water rights recognized under state law, Section 27 requires that the licensee acquire or condemn the rights affected. And FERC has no mandate to regulate water uses except insofar as they pertain to a proposed power generation project.

Moreover, when the Commission does undertake to review a proposed water power project, it is expressly directed by Section 10(a) to give careful consideration to all existing and potential beneficial uses of water. It is thus inappropriate to assume, as petitioner does, that the Commission is insensitive to the nature or needs of state water systems. In ECPA, Congress has established a procedural framework calculated to foster that approach. Consequently, there is no support for the suggestion that the Commission is bent on constituting itself a "super water rights agency," issuing "a body of FERC-created [water] law," or upsetting a State's "policy judgments concerning its economic and social order." Pet. Br. 44, 45, 47.

Nevertheless, when all is said and done, there remains the possibility that the Commission and state agencies will reach inconsistent judgments about the advisability or scope of a proposed hydropower project. As in *First Iowa*, state legislatures may enact statutes that forbid development that the Commission determines to be in the national interest. Alternatively, state water agencies and the Commission may weigh the same factors differently, or they may be charged under their respective statutes with assessing different factors. In those cases, the Federal Power Act specifies that the Commission's determina-

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[39] See *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 782 (1984); *Rumford Falls Power Co.*, 36 F.P.C. 605, 607 (1966); *Rumford Falls Power Co.*, 34 F.P.C. 27, 29 n.4 (1965), rev'd on other grounds, 355 F.2d 683 (1st Cir. 1966); *Seneca Nation of Indians*, 6 F.P.C. 1025, 1026 (1947); *East Bay Municipal Utility District*, 1 F.P.C. 12 (1932).

tions are to prevail. Congress could have, but did not, leave the direction of hydropower development to the States. Instead, it charged the Commission with the ultimate authority to consider and reconcile "those uses of the Nation's water resources in which the Federal Government ha[s] a legitimate interest." *FPC* v. *Union Electric Co.*, 381 U.S. at 98. Petitioner's competing vision of the appropriate division of federal and state authority should be addressed to Congress, not the courts.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1990

STATUTORY APPENDIX

Sections 4(a), 4(e)-(f), 6, 7, 9(a)(2) [previously 9(b)], 10(a), 10(g), 10(j), 21, and 27 of The Federal Power Act of 1935, as amended, 16 U.S.C. 797(a), 797(e)-(f), 799, 800, 802(a)(1), 803(a), 803(g), 803(j), 814, 821, provide in pertinent part as follows:

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter. * * *

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement

of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until

two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. *In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.*[1]

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

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[1] Emphasis added to language added by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243.

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licenseee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.

§ 800. Issuance of preliminary permits or licenses

(a) Preference

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adopted, or shall within a reasonable time to be fixed by the Commission be made equally well adopted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest

the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license.

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the

State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.[2]

§ 803. Conditions of license generally[3]

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, *for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)*, and for other beneficial public uses, including *irrigation, flood control, water supply, and* recreational *and other* purposes *referred to in section 797(e) of this title* [*sic*] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan de-

[2] Previously 16 U.S.C. 802(b) (1982).

[3] Emphasis added to language added by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243.

scribed in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license. * * *

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require. * * *

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and

statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

§ 814. Exercise by licensee of power of eminent domain

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts

of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

§ 821. State laws and water rights unaffected

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

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STATE OF CALIFORNIA,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

In its reply brief, respondent Federal Energy Regulatory Commission (FERC) offers inconsistent interpretations of section 27 of the Federal Power Act (FPA). On the one hand, FERC argues that section 27 preserves only state laws recognizing "proprietary rights" in water. FERC Br. 14-17, 30-41. On the other hand, FERC argues that section 27 authorizes state regulation of hydropower uses only to the extent not inconsistent with the FERC license, and then argues that California's regulation is inconsistent with the FERC license here. FERC Br. 41-48. The first argument is that section 27 is limited to "proprietary rights" and does not authorize state regulation of water, and the second argument is that section 27 is *not* limited to "proprietary rights" but instead authorizes state regulation to the extent not inconsistent with FERC regulation. FERC purports to find both interpretations in the language and legislative history of section 27.

In *California v. United States*, 438 U.S. 645 (1978), this Court rejected both arguments in construing section 8 of the Reclamation Act of 1902, the precursor of section 27. This Court rejected the United States' "proprietary rights" argument because the legislative history made clear that Congress meant to authorize state regulation of water. 438 U.S. at 663-670. The Court rejected the United States' argument that state regulation in "conflict" with the Secretary of the Interior's operational plans is invalid, holding instead that state regulation is permissible to the extent not in conflict with "clear *congressional* directives." *Id.* at 668 n. 21, 672, & n. 25 (emphasis added). FERC makes virtually the same arguments that the *California* Court rejected in construing section 8. Because of the progenitive relationship between sections 8 and 27, the same arguments should be rejected here.

I. SECTION 27 INCLUDES STATE REGULATORY WATER LAWS AND IS NOT LIMITED TO STATE LAWS RECOGNIZING "PROPRIETARY RIGHTS"

A. California v. United States

FERC argues that the reference in section 27 to state laws relating to "control, appropriation, use, or distribution of water" is substantially limited by the reference to "irrigation," "municipal or other uses," and "vested rights," and that, under the principle of *ejusdem generis*, the entire provision applies only to state laws recognizing "proprietary rights." FERC Br. 14-17. Respondent

Rock Creek Limited Partnership ("Rock Creek") makes a similar argument, asserting that California laws are not applicable because the Rock Creek project does not affect "proprietary rights" recognized under appropriative or riparian principles. Rock Creek Br. 43-46.

In *California v. United States*, this Court rejected the "proprietary rights" argument in construing section 8 of the Reclamation Act of 1902. Section 8 provides, similarly to section 27, for non-interference with state laws relating to the "control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. § 372, 383. In *California*, the United States argued that, under the principle of *ejusdem generis*, the reference to "irrigation" and "vested rights" implies that the provision applies only to "vested" or "proprietary" rights. Brief for United States, *California v. United States*, at 36, 126, 132, No. 77-285, Oct. Term, 1977 (hereinafter "U.S. Br. *(California)*"). This Court rejected the argument, stating that section 8 "does, of course, provide for the protection of vested rights, but it also requires the Secretary [of the Interior] to comply with state law in the 'control, appropriation, use, or distribution of water.'" 438 U.S. at 674-675. Thus, the *California* Court distinguished between state laws relating to "control, appropriation, use, or distribution of water" and state laws recognizing "vested" or "proprietary" rights, holding that the former reference is greater than, and is not limited to, the latter. The Court specifically "disavow[ed]" the dicta of earlier decisions that had adopted the opposite view. *Id.* at 672-674, & n. 24; Pet. Br. 38. The Court stated that the United States' "proprietary rights" argument would "trivialize the broad language and purpose of § 8," 438 U.S. at 675, a characterization that equally applies to FERC's "proprietary rights" argument in the context of section 27.

Rock Creek argues that *California* is distinguishable because the Reclamation Act provides for "federal funding for irrigation projects" that have limited regional effects, and the FPA, conversely, establishes a "complete scheme of national regulation." Rock Creek Br. 35-36.[1] To the contrary, the Reclamation Act establishes a broad national program to reclaim the nation's arid

[1] In fact, federal reclamation projects are authorized for multiple purposes—municipal supply, hydropower, industrial and instream uses—and are not limited to "irrigation" uses. Act of Feb. 25, 1920, 41

lands, and accomplishes this goal by providing for federal construction and operation of reclamation projects that serve broad public needs.[2] The early proponents of the federal reclamation program, including President Theodore Roosevelt, emphasized that the program was necessary to further the "national" goal of reclaiming the nation's arid lands. 35 Cong. Rec. 6775 (1902) (President Roosevelt's annual message to Congress); *id.* at 2222 (Sen. Clark). Importantly, both the Reclamation Act and the FPA are concerned with development of water for specified economic purposes, and both create federal agencies that have responsibility over such development. If anything, the Reclamation Act involves greater national interests than the FPA, for the Reclamation Act provides for direct *federal* development of water and the FPA provides for federal regulation of *private* development. Thus, there is no basis for construing the preemptive effects of the FPA more broadly than the Reclamation Act, particularly because of the similarity of their anti-preemption provisions.[3]

Stat. 451, 43 U.S.C. § 521; see *California*, 438 U.S. at 651 (describing multiple purposes of New Melones Project).

[2] On the other hand, most of the nation's hydropower industry is located in the seventeen continental western states. Of the total national hydroelectric generating capacity for the electric utility industry, 74% of such capacity exists in these seventeen western states and 56% of such capacity exists in the states of California, Oregon and Washington alone. See Edison Electric Inst., "Statistical Yearbook of the Electric Utility Industry/1988," Section IV, at p. 31 (Nov. 1989); Pet. Br. 8 n. 2. Virtually all the public utilities that have filed amici briefs supporting the respondents are located in these seventeen western states.

[3] FERC argues that *California* is distinguishable because section 8 specifically requires the Secretary of the Interior to "proceed in conformity with" state law and no similar directive is found in section 27. FERC Br. 27. The obvious reason for the different phraseology is that section 8 applies to the Secretary of the Interior, who has general sovereign immunity from state law, and section 27 applies to private power companies, who do not have sovereign immunity. Moreover, contrary to FERC's argument, Congress did not regard the "proceed in conformity with" phrase as substantially affecting the meaning of section 8. As this Court noted in *California*, Senator Newlands, one of the sponsors of the reclamation bill, described an earlier bill that omitted the phrase as "identical in its provisions, though differing somewhat in phraseology," to the bill in its final form that included the phrase. 438 U.S. at 664 n. 19.

FERC argues that California does not have "proprietary" interests in fish because California does not authorize appropriation of water for instream fish needs. FERC Br. 42-43. In fact, all states, including California, have sovereign "proprietary" interests in navigable waters and fish resources under the equal footing doctrine, subject to Congress' paramount commerce and property powers. See, *e.g., Martin v. Waddell*, 41 U.S. 367, 410 (1842) (states have "dominion and property in navigable waters"); *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876) (the states have "title" to and "ownership" of fisheries, in the nature of a "property right"); *Shively v. Bowlby*, 152 U.S. 1, 11 (1894) ("title and . . . dominion"); Pet. Br. 18-20. Indeed, the legislative history of section 27 indicates that Congress deferred to state water laws in part because of the states' "proprietary" interests in water. Pet. Br. 23, 25, 29. 34. California chooses to protect its "proprietary" interests in fish not by issuing permits for instream fish flows, but by requiring the State Board to consider fish needs in acting on appropriative permit applications. Cal. Water Code §§ 1253, 1255, 1257. In any event, section 27 is not limited to—and does not even mention—state "property" laws, but instead includes *all* state laws relating to "control, appropriation, use, or distribution" of water for "other uses." Under California law, instream fish flows are a "beneficial use" of water, Cal. Water Code §§ 1243, 1257, and therefore such flows consist of

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FERC also argues that *California* is distinguishable because FERC licensees have a "federal right of eminent domain" under section 21 of the FPA and the Secretary of the Interior does not have an equivalent federal right under the Reclamation Act. FERC Br. 27-28. In fact, section 7 of the Reclamation Act authorizes the Secretary to acquire water rights by condemnation. 32 Stat. 389-390 (1902). In *California*, this Court held that section 8 requires the Secretary to comply with state law in exercising his condemnation authority under section 7. 438 U.S. at 665 (Secretary must "purchase, appropriate, or condemn necessary water rights in strict conformity with state law"). Since section 8 requires the Secretary to comply with state law in exercising his condemnation rights, section 27 requires a private power company to comply with state law in exercising its condemnation rights. Thus, there is no distinction between the Reclamation Act and the FPA in this respect.

"other uses" under section 27. See also *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954) ("other uses" include hydropower uses). Hence, although California has "proprietary" rights here, such rights are not strictly relevant in construing the effect of section 27.

B. First Iowa

The respondents argue that this case is governed by *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), which upheld the "proprietary rights" argument in construing section 27. FERC Br. 11-14; Rock Creek Br. 10-18. The *First Iowa* analysis of section 27 was dictum because the Court actually held only that section 9(b) does not require a state water right as a "condition precedent or administrative remedy that must be exhausted before securing a federal license," 328 U.S. at 170, and the Court examined section 27 only for the purpose of distinguishing its "substantive" effects from the "informational" requirements of section 9(b). 328 U.S. at 175-178. Thus, *California v. United States* can be reconciled with *First Iowa* by holding that a hydropower project must acquire a state water right prior to diverting water but not prior to acquiring a FERC license, a reconciliation that, as the states' amici brief notes, is consistent with the legislative history of the FPA. Amici States Br. 4-8; Pet. Br. 32 n. 15, 42.

Signficantly, the respondents fail to respond to our argument that *First Iowa* specifically relied on section 8 of the Reclamation Act in construing section 27. According to *First Iowa*, section 27 "carries" the meaning of section 8 "into" the FPA. 328 U.S. at 176 n. 20. Since *California v. United States* rejected the "proprietary rights" argument in construing section 8, *California* rejected the premise of *First Iowa*'s analysis of section 27. The respondents make no reference to *First Iowa*'s linkage of sections 8 and 27.[4]

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[4] The Solicitor General argued in *First Iowa*, contrary to his argument here, that sections 8 and 27 should be construed congruently. FPC Br., at 39 n. 23, *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, No. 603, Oct. Term, 1945 ("A restricted construction of section 27 is supported by the legislative history of that Section which shows that it was derived from Section 8 of the Reclamation Law of 1902"). The Solicitor General made the same argument in *California v. United States*. U.S. Br. (*California*), at 23, 51-54, 129 (*First Iowa* is "closest analogous case"). To be sure, petitioner California in *California*

Most importantly, the *First Iowa* Court applied the wrong preemption standard in construing section 27. See Amici Council of State Governments Br. 28-29. The *First Iowa* Court stated that an overlapping federal and state permit system would be "unworkable" in light of FERC's "comprehensive" authority, 328 U.S. at 168, and that Congress must be presumed to have rejected an overlapping system "in the absence of an express provision for it." 328 U.S. at 167. More recently, however, this Court has rejected the argument that preemption "is to be inferred merely from the *comprehensive* character" of a federal regulation, stating that "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 407 (1973) (emphasis added). In particular, where the states have traditionally regulated the matter under their police powers, the Court starts with "the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). See also *California v. ARC America Corp., et al.*, ___ U.S. ___, 109 S.Ct. 1661, 1665 (1989). Thus, this Court has rejected the *First Iowa* view that Congress presumptively intends to preempt overlapping state systems, and has held instead that Congress presumptively does *not* intend to preempt state laws in areas traditionally regulated by the states.[5]

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sought to distinguish *First Iowa* on grounds that FERC's "comprehensive" authority indicates that state laws are not applicable. Pet. Rep. Br., at 16-17, *California v. United States*, No. 77-285, Oct. Term, 1977. Petitioner California asserted this argument without having researched the legislative history of the FPA, which unequivocally indicates that section 27 was modeled after section 8. The Solicitor General's analysis of the linkage between sections 8 and 27 in *First Iowa* and *California* more accurately reflects the legislative history than California's contrary assertion in *California*.

[5] FERC asserts that no court has questioned the validity of *First Iowa*. FERC Br. 22, 24. This Court, however, has held in other decisions—as in *First Iowa* itself—that sections 8 and 27 should be construed congruently because of the similarity of their language and purpose. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950) ("Congress' action [in enacting section 8] parallels that in" enacting section 27); *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 255 (1954) (citing "parallel reasoning" in *Gerlach*—which interprets section 8—for conclusion that section 27 preserves water rights recognized under state law). The reasoning of these decisions supports the conclusion that, in light of *California*, section 27 is not limited to "proprietary rights."

FERC asserts that its preemption view is supported by *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955), the so-called *Pelton Dam* case, in which this Court upheld the "constitutional and statutory authority of the FPC to grant a valid license for a power project on reserved lands of the United States." 349 U.S. at 444-445; FERC Br. 23. Oregon challenged FPC's authority to issue licenses that varied from state law on grounds that the Desert Land Act of 1877 made state law applicable on *public* lands. This Court rejected Oregon's argument on grounds that the Desert Land Act does not apply to *reserved* lands. 349 U.S. at 446-448. Although *Pelton Dam* employed broad language that was both unnecessary to the decision and unsupported in the legislative history, the decision considered only the scope of the FPC's constitutional and statutory licensing authority on reserved lands, and did not specifically consider the scope of state authority to issue permits in state proceedings, which is the issue raised here.

II. THE LEGISLATIVE HISTORY INDICATES THAT SECTION 27 AUTHORIZES THE APPLICATION OF STATE REGULATORY WATER LAWS TO HYDROPOWER PROJECTS

The respondents argue that California's interpretation of the legislative history is inaccurate. Rock Creek argues that the proponents of federal hydropower legislation were engaged in a protracted dispute with the western congressmen who opposed such legislation, and that the federal proponents finally prevailed. Rock Creek Br. 25-26. FERC argues, in a slightly different vein, that Congress at various times considered both a "narrow" savings provision limited to "proprietary rights" and a "broad" provision containing no such limitation, and that Congress finally adopted the "narrow" provision. FERC Br. 40-41. As we explain, the respondents misconstrue the nature of the dispute between the federal proponents and the western congressmen, and, more importantly, misconstrue the compromise that reconciled their interests.

1. Although the federal proponents prevailed in establishing a broad federal hydropower program, the western congressmen prevailed in preserving state water rights authority over hydropower projects. The Wilson Administration hydropower bill, which was eventually incorporated in S. 1419, Pet. Br. 31, originally contained no savings provision similar to that in section 27. Hearings Before the House Committee on Water Power Legislation, 65th Cong., 2d Sess., at 619-620 (1919) (hereinafter "Hearings") (Rep. Mondell); FERC Br. 39. The western congressmen argued that the administration bill should be amended to include a savings provision. Hearings, at 619-620 (Rep. Mondell). At the behest of the western congressmen, the congressional committee—by a narrow 8-7 vote—amended the administration bill to include section 27. 56 Cong. Rec. 9115 (1918) (Rep. Taylor) ("[A]fter strenuous efforts I succeeded by a vote of 8 to 7 in getting section 27 put into this bill"). Because of the addition of the savings provision, the western congressmen supported the bill and it was enacted into law. During the ensuing congressional debates, the western congressmen stated that the provision fully preserved state water rights authority and required hydropower projects to comply with state water laws. *E.g.*, 56 Cong. Rec. 9768 (Rep. Doremus) (power companies "will be obliged to operate under the laws of the various States"); *id.* at 9110 (Rep. LaFollette) (federal licensees must acquire "all concessions and necessary powers of the State or States"); *id.* at 9115 (Rep. Taylor) (section 27 is "copied from the reclamation act"); *id.* at 9902 (Rep. Raker) (the federal licensee "gets its rights by applying to the State for it"); *id.* at 9114 (Rep. Mondell) ("[T]he bill expressly disavows any intent or purpose of taking over control of the waters from the States"); Pet. Br. 31-34. No other congressmen, including the most avid proponents of a federal program, offered any different interpretation of the savings provision. Indeed, Senator Shields of Tennessee, one of the leading federal proponents, stated that the bill "fully recognizes the sovereignty of the States over navigable streams within their borders and the property rights in their waters," and that "[c]ompanies proposing to build dams for the development of water power or other purposes are required to first obtain authority to do so from the States where the dams are to be built and the plants located and operated." Hearings, at 883.[6]

Thus, contrary to the respondents' argument, the western congressmen prevailed rather than succumbed in their attempt to preserve state authority. Indeed, it is questionable whether the hydropower bill would have been enacted if the western congressmen's interests had not been accommodated. In effect, the federal proponents and the western congressmen reached a compromise that that provided for federal regulation of private development but preserved traditional state water rights authority over such development. This compromise removed the last major obstacle to the federal hydropower program. The respondents ask that this Court ignore this congressional compromise by disregarding one of its key elements.[7]

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[6] The respondents argue that the western congressmen opposed federal hydropower legislation and therefore that their interpretation of section 27 should be ignored. FERC Br. 41; Rock Creek Br. 19 n. 12. To the contrary, the western congressmen whose statements are cited in the text above—particularly Congressman Taylor, the author of section 27, and Congressman Mondell, the author of section 8 of the Reclamation Act—voted *for* the hydropower bill after section 27 had been added. 56 Cong. Rec. 10052-10053 (1918). Moreover, since the western congressmen were the primary drafters and supporters of section 27, their interpretation of its effects is highly relevant, particularly because their interpretation was uncontradicted by the federal proponents.

[7] The respondents cite statements of several federal advocates, including members of the Wilson Administration, who argued for a "national" hydropower program because only the federal government could effectively provide for hydropower development. FERC Br. 39; Rock Creek Br. 20-22, 24 n. 16. These statements reflect only Congress' commitment to provide for federal hydropower development, and do not explain the savings provision that was the basis of the compromise worked out between the federal proponents and the western congressmen.

Rock Creek selectively cites portions of the legislative history which emphasized the need to protect "vested rights," arguing that the savings provision is therefore limited to "vested rights." *E.g.*, 51 Cong. Rec. 14067 (1914) (Rep. Taylor) ("irrigation"); 59 Cong. Rec. 1041 (1919) (Sen. Nelson) ("irrigation"); Rock Creek Br. 28-29. In the same vein, FERC cites Congressman Ferris' thumbnail description of the individual provisions of his hydropower bill. 51 Cong. Rec. 13625 (1914) ("vested rights"); FERC Br. 33. These statements reflect Congress' concern to protect vested rights, but other statements not cited by the respondents,

2. Contrary to respondents' analysis, the major concerns of the federal proponents—and the major disagreements between them and the western congressmen—were unrelated to whether state water laws should apply to hydropower projects. Indeed, the federal proponents generally conceded that state water laws should apply because of the states' "proprietary" interests in water. Hearings, at 874, 883 (Sen. Shields) (power companies must comply with state laws because the states have "exclusive and absolute sovereignty, jurisdiction, and control" of water subject to federal navigation power); 51 Cong. Rec. 14139 (1914) (Rep. Mann) (withdrawing objection to savings provision because "so far as the State control of water, . . . of course we can not interfere with that"). The main concern of the federal proponents was to remove federal obstacles to hydropower development by concentrating all federal licensing authority in a single agency, rather than continue to have such authority dispersed among several federal agencies. 56 Cong. Rec. 9110 (1918) (Rep. LaFollette) ("The three working together [the Secretaries of War, Interior and Agriculture] can harmonize all questions involving Federal interests"); *id.* at 1313 (Sen. Shields) (describing public support for legislation to repeal "present laws upon our statute books which have prohibited water-power development").

For their part, the western congressmen generally supported, or at least were not averse to, a federal program that would coordinate all federal licensing authority, assuming of course that state water rights authority was preserved. *E.g.*, 56 Cong. Rec. 9108 (1918) (Rep. LaFollette); 51 Cong. Rec. 13630 (1914) (Rep. Mondell) ("Legislation relevant to such water-power development is needed"); see note 6, *supra*. The western congressmen, however, strongly objected to the hydropower bills advocated by

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including those in the text above, reflect Congress' broader concern to preserve the states' *sovereign* control of water and its intent to require hydropower projects to comply with state law. *E.g.*, Hearings, at 874 (Sen. Shields) ("The several sovereign States have the exclusive and absolute sovereignty, jurisdiction, and control of such waters . . . subject only to the paramount power of Congress to regulate commerce"); S. Rep. No. 66, 64th Cong., 1st Sess. 4-5 (1916) ("[T]he State owns and controls the use of the water flowing within the streams within its boundaries"); 51 Cong. Rec. 14071 (1914) (Rep. Seldomridge) ("The power company will have to come in and conform to the laws of the State").

the federal proponents because the bills provided for the assessment of water use fees against hydropower projects.[8] In the view of the western congressmen, the federal government lacked constitutional authority to impose the fees because the states "owned" the water. See note 8, *supra*. The dispute over the fees provision impeded federal hydropower legislation from 1914 until the FPA was enacted in 1920. See note 8, *supra*. The respondents cite portions of the legislative history relevant to this collateral dispute, suggesting that its resolution in favor of the federal proponents indicates that Congress meant to override state water rights authority.[9] To the contrary, this dispute had nothing to do with whether state water laws should apply to hydropower

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[8] President Theodore Roosevelt precipitated the debate over hydropower legislation in 1908 by declaring that he would approve no more congressional bills authorizing individual projects until Congress (1) provided a fixed term for hydropower licenses, (2) developed a comprehensive plan for development, and (3) provided for imposition of water use fees against licensed hydropower projects. 42 Cong. Rec. 4698 (1908) (Letter from President Roosevelt). The first two conditions were not highly controversial, but the third delayed hydropower legislation for the next twelve years. M. Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 HARV. ENV. L. REV. 135, 148-149 (1986) ("[A] highly charged political impasse over the constitutionality of water use charges killed every bill"). The western congressmen strongly opposed the fees provision because, in their view, the states "owned" the water and therefore the federal government could not constitutionally impose the fees. S. Rep. No. 898, 63rd Cong., 3d Sess. 1 (1915); H.R. Rep. No. 61, 66th Cong., 1st Sess. 4 (1919); 59 Cong. Rec. 1040 (1920) (Sen. Nelson) ("The majority of the Senate held the view that . . . the Federal Government ought not to charge compensation for what is State property and not Federal property"); Hearings, at 874-883 (Sen. Shields) (arguing that Congress has constitutional power to impose fees notwithstanding state sovereign interests in water); Pet. Br. 27, & n. 13.

[9] For example, FERC asserts that Congressman Mondell opposed the original reclamation bill, H.R. 16673, because the savings provision, the precursor of section 27, "inadequately protected state prerogatives." FERC Br. 34. In fact, Congressman Mondell generally supported the need for federal legislation, and in the passage cited by FERC objected to the fees provision. 51 Cong. Rec. 13630-13631 (1914) (Rep. Mondell) ("Legislation relevant to such water-power development is needed," but legislation should not contain provision that "may lay an

projects and its resolution in favor of the federal proponents is irrelevant in explaining the meaning of section 27.

3. The legislative history also contradicts FERC's assertion that Congress adopted a "narrow" savings provision rather than a "broad" one. According to FERC's argument, the savings provision in S. 1419 that was enacted as section 27 included a specific reference to "vested rights," and this reference restricted the provision's scope to "vested rights" and thus rendered the provision a "narrow" one. FERC Br. 40-41. FERC contrasts this "narrow" savings provision with the provision in an earlier hydropower bill, H.R. 16673 as amended, that omitted the "vested rights" phrase and thus, in FERC's view, was a "broad" one. *Id.* In fact, the legislative history of both provisions indicates that Congress did not regard the inclusion or omission of the "vested rights" phrase as substantially altering the provision's broad effect. The phrase was deleted from the earlier hydropower bill by the provision's author, Congressman Taylor of Colorado, at the request of Congressman Mann of Illinois;[10] Congressman Taylor

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excise tax upon the use of the water which the people of the States own").

Rock Creek cites Senator King's statement opposing the Wilson Administration bill for the view that section 27 did not preserve state water rights laws. 59 Cong. Rec. 7778-7779 (1920) (Sen. King); Rock Creek Br. 22. In fact, Senator King's statement indicates only that some western representatives opposed *all* federal regulation of hydropower, unlike others, such as Congressmen Taylor and Mondell, who supported federal regulation to the extent not inconsistent with state water rights laws. See note 6, *supra*.

Rock Creek cites Congressman Raker's statement objecting to a proposed state "consent" provision in section 9(b) for the view that Raker supported the preemption view. Hearings, at 368 (Rep. Raker); Rock Creek Br. 23. In fact, Raker objected only to a proposal that would have required the project operator to acquire state water rights "before he can even come to" the federal commission. Hearings, at 368 (Rep. Raker). Congressman Raker thereafter sought to amend the bill to require an applicant only to file an "application" for a state water right before applying for a FERC license, and, as we noted in our opening brief, his amendment was defeated. Pet. Br. 33 n. 15.

[10] Congressman Mann offered an amendment to delete the savings provision in H.R. 16673, section 14, objecting that "[t]he provision says that any law that a state passes for any use of water shall prevail over this

stated, however, that the deletion "would not materially weaken the bill" and that the provision as amended "would make the Government and these water-power companies come in and acquire their water rights under our State laws the same as other people." 51 Cong. Rec. 14139 (1914) (Rep. Taylor). As we have noted, the congressional debates relating to the S. 1419 savings provision—which contained the "vested rights" phrase and thus, in FERC's view, was a "narrow" one—indicate that the savings provision in that form broadly preserved state water rights authority and required hydropower projects to comply with state law. *E.g.*, 56 Cong. Rec. 9110 (Rep. LaFollette); *id.* at 9768 (Rep. Doremus); *id.* at 9902 (Rep. Raker); *id.* at 9114 (Rep. Mondell); see page 8, *supra*.[11] Indeed, the only apparent purpose of the "vested rights" phrase was to accentuate the provision's broad effect by specifically protecting vested rights, and hence its purpose was not to *limit* the provision to "vested rights." 51 Cong. Rec. 14139 (Rep. Mondell) (objecting that deletion of "vested rights" phrase "would jeopardize vested rights"). In short, there were no "broad" or "narrow" alternatives of the savings provision. Rather, in Congress' view, the provision broadly preserved state

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law." 51 Cong. Rec. 14066-14067. Two days later, Congressman Mann, apparently having been lobbied to change his view, withdrew much of his objection, stating that "so far as the State control of water, . . . of course we can not interfere with that anyhow." *Id.* at 14139. Congressman Taylor, apparently having worked out a compromise with Congressman Mann in advance, then amended section 14 to delete the phrase "used in irrigation or for municipal or other uses, or any vested right acquired therein." *Id.* at 14139. As explained above, Congressman Taylor stated the amendment would not "materially" change the bill. *Id.* at 14139. As FERC notes, this phrase was also omitted from section 14 in H.R. 408 in the next session, but reappeared in S. 1419 and H.R. 3184, which incorporated the Wilson Administration bill. FERC Br. 39-40.

[11] FERC argues that Senator Myers, in describing the savings provision in S. 1419 as "similar to" the savings provision in H.R. 16673 as amended, was "incorrect" because the later bill included the "vested rights" phrase and the earlier one did not. 56 Cong. Rec. 10494 (Rep. Myers); FERC Br. 40 n. 34. In fact, Senator Myers' statement indicates that Congress did not regard the addition or deletion of the phrase as substantially changing the provision's effect.

water rights authority whether the "vested rights" phrase was included or not.

III. FERC'S "COMPREHENSIVE" AUTHORITY UNDER SECTION 10(a) DOES NOT SUPPORT ITS PREEMPTION ARGUMENT

The respondents argue that state regulation of hydropower projects would interfere with FERC's authority under section 10(a) to develop a "comprehensive plan for improving or developing a waterway or waterways." 16 U.S.C. § 803(a); FERC Br. 9, 18-22; Rock Creek Br. 10. According to their argument, the assertion of state authority would allow the states to "nullify" FERC's "balance" of competing needs, thus resulting in a "different project" or a potential "veto" of a project. *Id.* In *California v. United States*, this Court rejected a similar argument in construing section 8.[12]

The preemption question cannot properly be framed in terms of the effect of state regulation on FERC's "comprehensive" authority, because Congress has directly provided in section 27 that hydropower projects are subject to state laws relating to "control, appropriation, use, or distribution" of water. Thus, Congress has balanced the need for "comprehensive" federal regulation and the need to preserve traditional state water rights authority, and has struck the balance in favor of overlapping federal and state regulation. This dual regulatory system is similar to that under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, which, as interpreted by this Court in *Cummings v. Chicago*, 188 U.S. 410, 431 (1903), provides for the "joint assent" of both the federal government and the states with respect to activities affecting both federal navigation interests and state water rights interests.[13] As

[12] In *California*, the United States argued that "Congress has recognized the need for unitary administration and ultimate administrative authority with respect to reclamation projects, and has given these functions to the Secretary of the Interior," who has "broad authority to operate and maintain reclamation projects." U.S. Br. (*California*), at 112, 114. This Court rejected the argument on grounds that Congress had specifically deferred to state water laws in section 8. 438 U.S. at 663-670.

[13] FERC makes the astonishing argument that *Cummings* did *not* hold that such navigation-affecting activities must fully comply with state water laws, FERC Br. 45, an argument that would enable the Army Corps of Engineers, in issuing a permit under the 1899 act, to override state water rights authority. *Cummings* plainly rejected the argument, holding that such activities must have the "joint assent" of both the federal and state governments. 188 U.S. at 431.

this Court has stated in another context, the federal permit is an "acknowledgement that the activity does not violate federal law, not an exemption from state licensing or police power requirements." *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). Thus, FERC's predecessor, the Federal Power Commission, was correct in its contemporaneous view that "[t]he development of water power on the lands of the United States requires the approval of both the State and Federal Governments, the former granting the right to use the water, the latter the right to use the land." FPC, Fourth Annual Report, at 10-11 (1924); see Pet. Br. 35 n. 17; Amici States Br. 20-24.

In providing for dual federal and state regulation, Congress recognized the need to preserve state authority to comprehensively manage and regulate all water rights in individual river systems. The states cannot provide for coordinated management if hydropower projects are exempt from state laws that apply to all other users. FERC appears to argue that any "anomalies" in state water rights regulation are justified because of the need to achieve the "national" objectives of the FPA. FERC Br. 29. To be sure, hydropower development raises national concerns, and Congress acted pursuant to its commerce and property powers to address these national concerns. On the other hand, hydropower development raises significant state concerns as well. The allocation of water for hydropower uses limits availability of water for competing instream and consumptive uses that are regulated under state law. Amici States Br. 25. As this Court has noted, water rights are "highly interdependent" because many users compete for a limited supply. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Because of this interdependency, a hydropower project located in, for example, California's Stanislaus River may have more in common with other water users in the Stanislaus than with a hydropower project in, for example, New York's Mohawk River, because the California project's uses are in competition with other instream and consumptive uses in the same river. Congress responded to these diverse federal and state concerns by providing for both federal

and state regulation of hydropower projects. It is neither inconsistent nor unusual for Congress to respond to diverse federal and state concerns by accommodating such concerns within the framework of dual systems. Pet. Br. 41 n. 22. Certainly the states have no incentive to impede hydropower development, for the states' citizens are the beneficiaries of such development. If the states were to impede development, Congress has paramount authority under its commerce powers and, in some instances, its property powers to override the state impediment. To date, Congress has not acted.[14]

Indeed, although section 10(a) requires FERC to consider the needs of individual projects in relation to a "comprehensive plan for improving or developing a waterway or waterways," FERC has no authority to develop a comprehensive plan regulating all water rights in an entire waterway. Under the FPA, FERC's jurisdiction is limited to hydropower uses and does not extend to non-hydropower consumptive uses—municipal, agricultural and industrial uses—that compete with hydropower uses for water.[15] Therefore, FERC does not develop "comprehensive" plans for entire waterways, but instead considers individual project needs on a case-by- case basis. "Martha O. Hesse Nomination," Hearing Before the Committee on Energy and Natural Resources, U.S. Senate, 100th Cong., 1st Sess. 171 (July 9, 1987) (testimony of FERC chairwoman) ("Commission is [not] authorized to 'plan' a waterway in the sense of issuing a 'plan' that determines what all the various uses of the waterway should be"); States Amici Br. 27. The states, on the other hand, have jurisdiction over *all* competing uses in a river system and, particularly in

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[14] FERC argues that Congress accommodated state interests by allowing the states to participate in FERC proceedings and to request FERC to apply state law. FERC Br. 21-22. Apart from the fact that this result would surrender the states' sovereign interests in regulating hydropower development to a federal agency that, as in this case, has not always been responsive to state concerns, section 9(b) of the FPA already affords that remedy to the states, and thus FERC's argument would render section 27 a nullity.

[15] Hence, although FERC argues that it is required to "consider" hydropower needs in relation to "water supply" and "irrigation" needs, FERC Br. 26-27, FERC has no jurisdiction to actually allocate water for such water supply and irrigation needs.

recent years, have exercised this authority to provide for comprehensive management and regulation of all water rights. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 444 (1983). Thus, the states, which have traditionally regulated water rights, are best qualified to develop comprehensive management plans for entire river systems, and in any event bring to the regulatory process a set of legitimate concerns that are beyond FERC's jurisdiction. In enacting section 27, Congress preserved the states' traditional management authority in the specific context of hydropower development. Thus, section 10(a) requires FERC to look beyond hydropower needs, but does not diminish state authority to provide for coordinated management of all rights.

Since Congress has directly answered the preemption question by enacting section 27, it is impermissible to infer preemption from FERC's "comprehensive" authority, whatever the scope of such authority. Amici Council of State Governments Br. 6-9, 16-17, 27. Even in ordinary preemption cases, as we have noted, this Court does not infer preemption from the "comprehensive" nature of federal regulation, particularly where the states have traditionally regulated the matter under their police powers. *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 407 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see page 6, *supra*. Such an inference is particularly inappropriate where Congress has adopted a specific anti-preemption provision, for Congress has already determined that state regulation does not "conflict" with federal law or stand as an "obstacle" to its purposes. The preemption inquiry is ultimately one of congressional intent, and Congress has specifically manifested its intent in section 27.

IV. THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL FLOW REQUIREMENTS HERE, AND ANY SUCH CONFLICT IS IMMATERIAL IN ANY EVENT

FERC argues that, although California has the right to apply regulations that are not in "conflict" with FERC regulations, California's instream flow requirements "conflict" with the FERC requirements because they strike a different "balance" between hydropower and instream needs. FERC Br. 41-48. As we have noted, FERC's argument is inconsistent with its argument that

section 27 is limited to "proprietary rights," an argument that would preclude *any* state regulation of hydropower uses.

In any event, it is immaterial whether California's flow requirements conflict with the FERC requirements. In *California v. United States*, this Court held that section 8 authorizes the application of state laws to the extent not in conflict with "clear *congressional* directives." 438 U.S. at 672, & n. 25, 668 n. 21 (emphasis added).[16] Therefore, the proper inquiry is whether state law conflicts with a *congressional* directive, not with the federal *administrative* license. Indeed, in *California*, the United States and California agreed that the State Board conditions were inconsistent with the Secretary of the Interior's operational plans for the New Melones Project. This Court disregarded the conflict, holding that the specific congressional directive requiring compliance with state law is limited only by equally specific congressional directives establishing substantive reclamation policies. See note 16, *supra*. Thus, section 27 tolerates conflicts between federal and state licensing authority, providing not that conflicts are resolved in favor of federal authority but rather that hydropower projects must gain the "joint assent" of both the federal and state governments as a condition of operation. Cf. *Cummings*, 410 U.S. at 431.

Moreover, California's flow requirements do not conflict with the FERC requirements. California's requirements are higher than, and thus encompass, the FERC requirements. FERC argues that its requirements strike a "balance" between hydropower

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[16] The respondents argue that section 10(a), in authorizing FERC to exercise "comprehensive" planning authority, is a "clear congressional directive" that, within the meaning of the *California* decision, preempts state water laws. FERC Br. 28; Rock Creek Br. 38-40. This argument would stand the *California* decision on its head by precluding virtually all state regulation of water. In *California*, this Court held that state authority is limited by specific *substantive* congressional reclamation directives, such as the appurtenancy requirement in section 8 and the acreage limitation in section 5. 438 U.S. at 668 n. 21. The *California* Court rejected the United States' argument that the Secretary of the Interior's general authority to "operate" reclamation projects effectively preempts all state regulation of such projects. *Id.* at 677-678. California's flow requirements in this case do not conflict with any congressional *substantive* directives relating to hydropower, and FERC does not argue otherwise.

and instream uses and that the California requirements upset this balance. FERC Br. 43-45. In fact, the FERC license *requires* only that the project maintain minimum levels of instream flows, not that the project divert minimum quantities of water for hydropower purposes. License Order, at 8 (J.A. 25) ("minimum flows"). If, for example, the Rock Creek project voluntarily decreased hydropower diversions in order to increase instream flows, it cannot be seriously argued that the project would violate the terms of its license. Thus, the project is free to *increase* instream flows above the levels required in the license, and is precluded only from *reducing* instream flows below these levels. Therefore, the California requirements, by requiring higher instream flows, do not conflict with the specific *requirements* of the FERC license. Amici American Rivers Br. 10-11.[17]

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[17] The respondents argue that their preemption view is supported by the Electrical Consumers Protection Act (ECPA), 100 Stat. 1243 (1986), which requires FERC in issuing licenses to consider the needs of "fish and wildlife" and also to consider recommendations of "State fish and wildlife agencies." 16 U.S.C. § 797(e), 803(j)(1); FERC Br. 25; Rock Creek Br. 30-32. ECPA specifically does not "affect the rights or jurisdiction of the United States, [or] the States," and does not "alter or establish the respective rights of States, [or] the United States . . . with respect to any water or water-related right." 100 Stat. 1259. Hence, by its own terms, ECPA does not affect state authority under section 27.

Additionally, ECPA contains no "clear congressional directive" precluding the application of state water laws. ECPA requires FERC to give heightened consideration to fish needs, but does not diminish state authority to also consider such needs. Congress ensured that fish needs are protected in states that provide inadequate protection, but did not reduce the authority of states such as California that provide adequate protection. California's flow requirements here are consistent rather than inconsistent with ECPA's goal of protecting fish needs.

Finally, ECPA by its own terms applies only to projects licensed after ECPA's enactment in 1986, 16 U.S.C. § 797(e), and thus does not apply to the Rock Creek project here.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The physiographic, hydrologic and climatic conditions within the United States vary greatly from region to region. In recognition of this fact, the forty-nine amici states have exercised their sovereign authority to adopt water law systems tailored to their individual needs. Congress recognized that federal intrusion upon these state systems of water regulation would undo the balance each state has struck between the various uses of this finite resource and thus has consistently and purposefully deferred to the primacy of state water law in all federal enactments affecting water allocation. *California v. United States*, 438 U.S. 645, 653 (1978).

At the heart of this case is one of the most explicit Congressional actions deferring to the primacy of state water law, section 27 of the Federal Water Power Act of 1920,[1] which provides as follows:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Despite the express Congressional deference to state regulation of water rights contained in section 27, the Federal Energy Regulatory Commission (hereinafter FERC),[2] now asserts, in direct contradiction to its contemporaneous administrative construction of the FPA, that it has

---

[1] The Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920), was subsequently incorporated in the Federal Power Act of 1935, 16 U.S.C. §§ 701(a)-793, 795-818, 820-825(r) (1982 & Supp. V 1987). These two acts will be collectively referred to as the "FPA."

[2] For simplicity, both FERC and its predecessor, the Federal Power Commission, will be referred to as "FERC."

exclusive authority to set flow regimes on streams and rivers containing FERC-licensed hydroelectric projects. *Rock Creek Limited Partnership*, 38 F.E.R.C. ¶ 61,240 (1987); 41 F.E.R.C. ¶ 61,198 (1987); *aff'd, California v. Federal Energy Regulatory Comm'n*, 877 F.2d 743 (9th Cir. 1989). FERC is attempting through its orders to create a role for itself that was never intended by Congress and to establish itself as the supreme authority over decisions relating to hydropower development. If allowed to stand, the Commission's orders will create a chaotic situation in state water law.

While the Rock Creek decision only involves a conflict between by-pass flows established by FERC and by-pass flows contained in the state water right for the same project, the principle to be considered by this Court is much broader. Water rights are "highly interdependent." Each use of water affects the quantity and quality of water available for other uses; thus, uniform control of water rights is essential. Accordingly, each state has a single comprehensive system of laws controlling the complex interplay of diversion, use, conservation and reuse among a variety of competing users. Like a house of cards, removal of a state's regulatory control over a single use threatens the downfall of the entire system. Thus, the amici curiae states have a significant interest in supporting California's petition and ask that this Court reverse the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

I

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), is cited by FERC as authority for its assertion that section 27 of the FPA only recognizes a right of compensation for vested water rights taken by FERC licensees. *First Iowa*, however, did not address the extensive legislative history of section 27

demonstrating the intent of Congress to defer to state regulation of hydropower water rights. Instead, the Court purported to broadly read the procedural requirements of the FPA, finding therein an implied substantive policy of preemption of state regulation. Such comments were unnecessary to decide the issue before the Court and cannot be considered controlling now that the substantive policy embodied by section 27 is squarely presented for decision.

An examination of the language and legislative history of section 27 reveals that Congress intended the states to control the granting of water rights for hydropower projects licensed under the FPA. The deference to state water laws found in section 27 is not limited to protection of proprietary rights, but instead recognizes full state regulatory authority over all aspects of water rights. Congress recognized that states were in the best position to effectively balance the competing uses of water and allocate water among those uses in accord with the public interest.

II

FERC attempts to grant itself exclusive authority over a broad range of issues associated with hydropower water rights and stream flow regimes based upon its administrative interpretation of the FPA. This broad preemption of state powers, however, can not be implied from the operation of the FPA, violates the intent of section 27, and in fact contradicts FERC's contemporaneous interpretation of section 27 of the FPA.

III

FERC's recent attempts to preempt state regulation of water have disrupted the ability of the states to ensure the orderly and efficient allocation of limited water resources among competing uses. Traditionally, Congress has deferred to state regulation of water because of the

vast physiographic and climatic differences of the states. Congress recognizes that state control of water allocation is in the best interest of the public. FERC's efforts to federalize water allocation are in conflict with the Congressional policy of deference to state water law and are furthermore unworkable. FERC's procedures for hearing issues related to issuance of a single hydropower license cannot substitute for the comprehensive information and planning abilities available to state water agencies. States retain the ability and resources to balance competing interests and reach decisions that maximize the benefits of hydropower development while minimizing the effect on other water users.

ARGUMENT

I. THE DICTUM IN FIRST IOWA HYDRO-ELECTRIC COOPERATIVE V. FEDERAL POWER COMMISSION MISSTATES THE INTENT OF CONGRESS IN ENACTING SECTION 27 OF THE FEDERAL POWER ACT.

A. The Court's Statements in First Iowa Went Far Beyond That Necessary To Decide The Narrow Question Before The Court.

In *First Iowa*, the sole question before the Court was whether section 9(b) establishes a condition precedent to the issuance of a federal hydropower license.[3] 328 U.S. at

[3] Section 9 provides:

> That each applicant for a license hereunder shall submit to the commission . . .
>
> (b) satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to

(Continued on following page)

163-64. The actual holding needed to answer that question was quite narrow: "The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license." 328 U.S. at 170. Nonetheless, the Court proceeded to condemn "duality of control" and the possibility of conflict between state and federal authority. 328 U.S. at 176 n.20. The Court avoided finding a conflict between state and federal requirements by reading into section 9(b) and 9(c) a substantive policy of preempting state laws regarding hydropower. The Court attempted to reconcile its assumption of preemption of state laws relating to hydropower by the FPA with section 27 by suggesting that the section merely protected existing water rights vested under state law.

The amici curiae states do not dispute the actual holding of *First Iowa*. The legislative history supports the conclusion that Congress did not intend section 9(b) to require compliance with state laws as a condition precedent to issuance of a federal license.[4] The amici do maintain, however, for purposes of resolving the case before it, that the *First Iowa* Court's broader and unnecessary statements regarding the substantive intent of section 9(b) were flawed, and such flaw was carried over into its

(Continued from previous page)

> the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

[4] *In First Iowa*, the Court noted that Congress rejected the following language, proposed in the Shields Bill, 65th Cong., 2d Sess., (1917): "That before the permit shall be granted under this Act, *the permittee must first obtain*, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of water power is proposed to be constructed." (emphasis added). 328 U.S. at 179.

interpretation of section 27. Since the Court's discussion of preemption and its supporting interpretation of section 27 were not necessary to the Court's holding that compliance with state laws is not a condition precedent under section 9(b), they must be regarded as dictum.[5] Thus, *First Iowa* does not control determination of the issue of section 27's operation, which is now squarely presented to this Court for decision. *See Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 319 n.9 (1977).

B. The Legislative History of the FPA Shows that Congress did not intend for Section 9(b) to Preempt State Law.

The legislative history of section 9(b) reveals that Congress, in rejecting prior compliance with state law as a condition precedent, did not intend to preempt state control of hydropower water rights. Instead, Congress rejected the requirement of prior compliance with state law for narrow, technical reasons. Congressman Raker of California, for example, expressed his concern that requiring applicants to comply with state appropriation laws prior to issuance of a federal license would prove impossible.[6] Under most state laws, an applicant can not perfect a water right until the water is actually diverted

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[5] Although merely dictum, the Court's interpretation of section 27 in *First Iowa* has been embraced by both the Federal Energy Regulatory Commission (FERC) and the Ninth Circuit Court of Appeals. Thus, the Court's statements in *First Iowa* have dramatically diminished state authority without fully addressing Congress' intent as to the proper role of the states in hydropower licensing.

[6] Although Congressman Raker made his remarks in relation to a version of section 9(b) that only required "satisfactory evidence" of compliance, the Congressman's remarks and the subsequent colloquy demonstrate the concerns which led Congress to do away with prior compliance as a condition precedent.

and put to beneficial use.[7] Since an applicant obviously could not build a dam or other diversion structure prior to obtaining a federal license, an applicant could never comply with all aspects of a state's appropriation law prior to issuance of such license. Thus, Congressman Raker suggested amending section 9(b) to only require compliance with state laws "with respect to application for the right to appropriate, divert, and use." 56 Cong. Rec. 9812.

Congressman Raker's amendment was rejected after Congressman Mondell of Wyoming explained the intent behind the present language of section 9(b):

> The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. . . . *there are other requirements of State Law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation.* This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application.

---

[7] Under the prior appropriation doctrine, once a diversion structure is completed and water actually put to use, the water right relates back to the date on which the applicant first applied for a diversion permit.

56 Cong. Rec. 9813 (emphasis added). Thus, the legislative history supports the Court's holding that compliance with state laws is not required as a condition precedent to issuance of a federal license under section 9(b). The legislative history also proves, however, that Congress did not intend to preempt state laws relating to hydropower projects but instead expected applicants to comply with a broad range of state requirements throughout the construction and operation of a hydropower project.

C. The First Iowa Decision Improperly Extrapolated Substantive Policy From Procedural Requirements.

The *First Iowa* decision assumed that the procedural requirements of the FPA implied a substantive policy of prohibiting dual state and federal control. The Court first noted that requiring licensees to comply with state permit requirements would vest the state with a "veto power" over the project, thus subordinating to the state the "comprehensive" planning authority of the Commission. 328 U.S. at 164. The Court then stated its belief that a "duplicated system" of state permits and federal licensing would be "unworkable." *Id.* at 168. Section 9 was characterized as containing the "solution" to this problem. *Id.* The Court stated:

> Section 9(c) permits the Commission to secure from the applicant "Such additional information as the commission may require." This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective states may have prescribed in state statutes as a basis for state action.

Id. at 169 (emphasis in original). In other words, the Commission had the discretion to pick and choose which state requirements an applicant had to meet, and could ignore all others. Thus, working from the broad nature of evidence that the Commission could require of an applicant, the Court inferred a broad preemption of state

laws.[8] The Court confirmed this holding by examining the legislative history of section 9(b), finding that in enacting section 9(b), "Congress was concerned with overcoming the dangers of divided authority . . . ."[9] *Id.* at 174.

The Court's construction of the procedural and information requirements of section 9(b) as a broad-ranging preemption of traditional state powers is inconsistent with other decisions of this Court. When evaluating statutes other than the FPA, this Court has carefully refrained

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[8] The legislative history demonstrates that Congress did not understand section 9 to set any substantive policy. Indeed, in over six years of debates over the FPA, section 9 was only addressed in any depth on two occasions. 56 Cong. Rec. 9110, 9810-15 (1918). Section 9(b) is also mentioned several other times in passing. *See, e.g.*, 54 Cong. Rec. 1387 (1917); 58 Cong. Rec. 2225-26 (1919); 59 Cong. Rec. 6537 (1920).

[9] In support of its finding, the Court cited the remarks of Congressman La Follette of Colorado, emphasizing the following statement: "[W]e are trying in this bill to overcome a divided authority and pass a bill that will make it possible to get development." 328 U.S. at 174, quoting 56 Cong. Rec. 9810 (1918). As noted in California's brief, La Follette was primarily addressing the "divided authority" between the Secretaries of War, Interior, and Agriculture. Petitioner's Opening Brief at 31. To the extent, however, that La Follette was addressing the division of authority between state and federal governments, he did not advocate preemption of state authority. In an earlier colloquy, La Follette explained how the present language of section 9 resolved the problem of divided state and federal authority: "[U]nder the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible . . . ." 56 Cong. Rec. 9110 (1918). La Follette went on to disavow any intent to vest all jurisdiction over hydropower in the federal government, stating: "Under this bill the State abrogates none of its powers or rights." *Id.*

from implying substantive policy from procedural or informational requirements. An example is found in *Robertson v. Methow Valley Citizens Council*, 490 U.S.___, 109 S. Ct. 1835, 104 L.Ed.2d 351 (1989). There, this Court addressed a National Environmental Policy Act requirement that environmental impact statements discuss mitigation measures in sufficient detail to ensure that environmental consequences have been fairly evaluated. The Court held that such a requirement was procedural in nature and did not imply a substantive policy requiring that actual mitigation action be taken. 109 S. Ct. at 1847, 104 L.Ed.2d at 372. *See also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

In contrast to the *Robertson* decision, the dictum in *First Iowa* suggesting that the FPA embodies a substantive policy of federal preemption was premised upon the procedural requirements of section 9(b). Continued reliance on the *First Iowa* dictum violates the principles established in *Robertson*, and is especially inappropriate in light of the Court's professed recognition in *First Iowa* that section 27 was intended to define the substantive role of state law under the FPA.

D. Canons Of Statutory Construction Indicate That Section 27 Is Intended To Defer To State Regulation Of Hydropower Water Rights.

In *First Iowa*, the Court used principles of statutory interpretation to find that section 27 was intended to have "primary, if not exclusive reference," to protection of vested proprietary rights. 328 U.S. at 176. Relying on this dictum, FERC asserts that section 27 "only establishes a right of compensation for vested water rights taken by a Commission licensee." *Guadalupe-Blanco River Authority*, 42 F.E.R.C. ¶ 61,079 (1988). This interpretation violates normal canons of statutory construction.

Section 27 provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The *First Iowa* Court assumed that because Congress only specifically mentioned irrigation and municipal uses, its sole intent was to prevent supersedure of vested proprietary rights. The Court rejected the suggestion that the words "other uses" encompassed a broader scope of state powers. 328 U.S. at 176. In reaching this conclusion, the Court relied on the doctrine of ejusdem generis, adopting the reasoning of a 1922 district court decision that the words "other uses" are "confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *Id.* The Court also stated that the phrase "any vested right acquired therein" further emphasized the application of section 27 to property rights. *Id.*

The above rules of construction, lightly touched upon in passing and incorporated within dictum in *First Iowa*, did not receive the consideration necessary to such an important issue. Initially, it should be noted that the doctrine of ejusdem generis only applies if a statute contains an enumeration of specific subjects that suggest a class, supplemented by a general reference. Under such conditions, the general reference is assumed to be limited to subjects within the same classification. 2A Sutherland, *Statutory Construction*, § 47.18 (4th ed. 1984).

In *First Iowa*, the Court's belief that "irrigation" and "municipal uses" suggested a class of state powers limited to protection of vested proprietary rights was

unsupported and unnecessarily narrow.[10] No special significance should attach to Congress' limiting its enumeration to irrigation and municipal uses. As noted in the Sutherland treatise on statutory construction, the human mind generally enumerates things in descending order. 2A Sutherland, § 47.19. In general, a large part of water regulation in the western states relates to irrigation and municipal use because these are the two largest uses of water. Thus, it is not especially significant that Congress chose only to enumerate irrigation and municipal uses before using the general reference to "other uses."

The legislative history also supports the conclusion that Congress did not intend the phrase "other uses" to limit the state role to protection of existing, vested rights but instead intended that water rights for hydropower projects would be integrated into the state's overall water regulatory system. For example, Congressman Taylor noted that licensees would be required to comply with all state laws necessary to appropriate the water:

> A power company must come in and put itself on the same footing and equality with other appropriators of water and make an appropriation under our laws so that those that are ahead will be ahead of water power companies authorized under this act; and those who are behind will be behind the new power company; in other words, they will have to come in on an equality with all other water users and acquire and use their water rights under our state water-right laws.

51 Cong. Rec. 14071 (1914). Further evidence that state control was intended to go beyond protection

[10] As discussed in the previous section, the Court's narrow reading of the class suggested by "irrigation and municipal uses" was prompted by its reading of section 9(b) to preempt state regulation of subjects addressed in the federal licensing process.

of vested rights is found in the remarks of Congressman Mondell of Wyoming:

> The law of the State is that [the hydropower applicant] shall make his application with certain necessary data and that there shall be in response to that inquiry [an] investigation as to whether there is water available that can be used to turn a wheel without depriving some one else of a prior right *and* whether or no the conditions are such that under the State law such water can be used at that point for power purposes.

56 Cong. Rec. 9814 (1918)(emphasis added). The members of Congress thus recognized two separate functions of state water laws: 1) protection of vested water rights, and 2) other, more general regulation of water rights under the state's police powers. Therefore, use of the phrase "other uses" cannot be said to encompass only those laws protecting vested rights.

The intent of Congress to defer to both aspects of state water law is also demonstrated by another well-established canon of construction requiring that effect be given, if possible, to every word or clause used in a statute. *Reiter v. Sonotone Corp.*, 442 U.S 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). If Congress had intended to limit section 27 to proprietary rights, it would have been sufficient to simply disclaim any intent to interfere with water rights vested under state law. Instead, Congress expressly deferred to state laws "relating to the control, appropriation, use, or distribution of water . . . or any vested right acquired therein." The sentence contains two clauses referring to separate aspects of state water law, connected by the disjunctive "or." The first clause refers to state laws regulating "control, appropriation, use or distribution of water." These are well established terms of art relating to state regulation of water rights under general police powers. The

second clause refers to state laws vesting water users with a protectable property interest. By interpreting section 27 to refer only to the proprietary rights referred to in the second clause, the Court rendered the first clause of the sentence a nullity.

Further significance is attached to the use of the word "or" to separate the two clauses. Terms separated by a disjunctive should be given separate meanings, unless the context dictates otherwise. *Reiter v. Sonotone Corp.*, 442 U.S. at 339. Thus, the second clause recognizing vested property rights cannot be properly read to modify the first clause deferring to state laws relating to the control, appropriation, use or distribution of water. A proper construction of section 27 is that the disjunctive "or" between the two phrases is intended to preserve both aspects of state water law.

E. The Legislative History Of Section 27 Reveals A Careful And Deliberate Attempt By Congress To Preserve Traditional State Powers Over Water Rights.

On its face, section 27 establishes a broad deference to state laws "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or for any vested right acquired therein." An examination of the legislative history, starting with the background against which the FPA was enacted, demonstrates that Congress' use of such broad language was not accidental, but was part of a deliberate and careful attempt to defer to all aspects of state water law.

The legislative and judicial background that led to the enactment of the major water projects bills of the

early twentieth century was exhaustively surveyed by this Court in *California v. United States*, 438 U.S. 645 (1978).[11] An examination of 7 statutes, dating from the Homestead Act of 1862 to the Reclamation Act of 1902, found a consistent intent on the part of Congress to defer to state regulation and control of water. *Id.* at 656-66. Importantly, the Court did not find that Congress' traditional deference was limited to state protection of vested proprietary rights. Instead, Congress was found to have consistently deferred to all aspects of state water law. Against this background of broad deference to state regulation, Congress enacted the Federal Power Act.

The FPA originated because of the barriers posed to hydropower development by divided state and federal authority. States controlled the beds, banks, and waters of navigable streams. While states could pass laws conferring upon individuals the right to construct hydropower dams, they could not confer the right to interfere with the federal government's navigational servitude. The risk of federal suits to assert the navigational servitude created such uncertainty that hydropower development was at a virtual standstill. The federal licensing procedure created by the FPA, therefore, was conceived as a method by which the federal government could address all issues related to the preservation and promotion of navigation and interstate commerce. 56 Cong. Rec. 9109-10 (1918) (remarks of Rep. La Follette). Other aspects of hydropower development, such as the procurement of water rights, were to remain under the control of the states. *Id.* In respect to non-navigable waters flowing through federal public lands, the relative scope of state and federal authority was even easier to define:

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[11] Although the Court undertook the survey as the background of the Reclamation Act of 1902, it is equally applicable to the FPA, enacted in 1920, because section 27 of the FPA was modelled after section 8 of the Reclamation Act of 1902.

> [A] person who desired to obtain a lease of the land adjoining the stream from the federal government would have to comply with the provisions of the laws of his State for the appropriation and use of water. I think section 27 makes it plain. . . . The State controls the use of the water, the Federal Government controls the use of the public land through which the water flows. The consent of each must be obtained: the consent of the State to the use of the water, the consent of the Federal Government to the use of the land.

56 Cong. Rec. 10494 (1918) (remarks of Senator Myers). Thus, Congress intended that the states and the federal government would work together, both exercising their respective traditional authorities, to promote hydropower development.

Another important factor in divining the understanding of Congress as to the respective roles of the state and federal governments in hydropower development is the Court decisions existing at the time the FPA was enacted. The actions of Congress were undertaken against the background of Supreme Court decisions finding that states retained "total authority" over their internal waters, subject only to the reserved rights and the navigational servitude of the United States. 438 U.S. at 662. The Court's decisions influenced the members of Congress in their deliberations on the FPA. Congressman Miller of Minnesota, for example, summarized *Kansas v. Colorado*, 206 U.S. 46 (1907), one of the most important Supreme Court decisions on the subject at that time, as follows in a 1914 debate:

> The court first clearly defines the powers of Congress over the waters of streams within the State, and then holds that the control of such streams is vested in the State, excepting only for navigation purposes. Quoting from the syllabus: " . . . While Congress has general legislative jurisdiction over the Territories and may control

> the flow of waters in their streams, *it has no power to control a like flow within the limits of a State except to preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the state.*

51 Cong. Rec. 13944 (1914)(emphasis added). Thus, in keeping with this Court's prior decisions, Congress could not have intended to supersede all aspects of state water laws except those protecting vested proprietary rights. Indeed, Section 27 must be interpreted in accord with the then existing belief of Congress that the constitution vested the power to control the flow of streams solely in the states, and that federal control over the water for any purpose except protection of the government's interests in navigation and federal reserved water rights would be unconstitutional.[12]

II. FERC'S EFFORTS TO ADMINISTRATIVELY ENLARGE THE SCOPE OF ITS POWERS ARE PROHIBITED BY THE FEDERAL POWER ACT AND ARE IN DIRECT CONTRADICTION TO THE EXPRESSED INTENT OF CONGRESS.

A. FERC's Administrative Interpretation of Section 10 of the FPA as Preempting State Water Law is in Conflict with Section 27 of the FPA.

FERC also attempts to justify its preemption of state water regulation on the basis of its comprehensive planning duties under section 10 of the FPA, as amended by the Electric Consumers Protection Act of 1986 (ECPA),

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[12] The amici curiae states also maintain, as discussed in California's Brief on the Merits, that the legislative history of the FPA shows a congressional intent to carry the meaning of section 8 of the Reclamation Act of 1902 into section 27 of the FPA. Petitioner's Opening Brief at 12.

Pub. L. No. 99-495, 100 Stat. 1243 (1986).[13] The comprehensive planning language contained in section 10,

[13] The respondents to this action have asserted that the absence of any legislation purporting to overturn FERC's current interpretation of section 27, as based on the dictum in *First Iowa*, represents the acquiescence of Congress to FERC's interpretation. The respondents specifically point to the fact that Congress passed the Electric Consumer Protection Act of 1986 without attempting to correct the *First Iowa* dictum regarding section 27. Brief of Respondent Rock Creek Limited Partnership in Opposition to Petition for Writ of Certiorari at 13-15; Brief of the Federal Energy Regulatory Commission in Opposition at 21.

No meaning can be artificially attached to the inaction of Congress on this issue. Nonaction by Congress on proposals to repudiate an interpretation of a statute by the federal courts affords a "most dubious foundation for drawing positive inferences" of acceptance by Congress of the courts' interpretation. *United States v. Price*, 361 U.S. 304, 310-11 (1960). It is especially inappropriate to infer Congressional ratification of FERC's interpretation of section 27, since preemption of traditional state powers over water rights invokes the principle of federalism. Decisions of great constitutional import and effect can not be relegated by default to administrators or assumed by acquiescence or nonaction. *See Green v. McElroy*, 360 U.S. 474, 506-07 (1959). Furthermore, Congress expressed its clear intent that passage of the ECPA was to have no bearing on the question of state control of hydropower water rights. Section 17 of the Act provides: "Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act – (1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource . . . . (3) alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related right." 100 Stat. at 1259. Congress was thus most careful to ensure that its silence would not be interpreted as tacit approval of FERC's interpretation of the FPA.

however, can not be read to impliedly preempt the intent of Congress stated in section 27 of the FPA to defer to state water laws. Section 27 must be interpreted as it stands without regard to the preemptive effect of the FPA in general, because section 27 is an "anti-preemption" savings clause. When presented with anti-preemption language in a statute, the proper mode of inquiry is to determine what Congress intended to effect by employing such language, instead of relying on a more generalized inquiry into the preemptive effect of the statute as a whole. *California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 295 (1987) (Scalia, J., concurring).

FERC's attempts to imply preemptive intent from section 10 are also barred by fundamental principles of federalism. Preemption of traditional state powers is not favored, and should be found only where preemption is "the clear and manifest purpose of Congress." *California v. ARC America Corp.*, ___ U.S. ___, 109 S. Ct. 1661, 1665, 104 L.Ed.2d 86, 94 (1989). It is especially inappropriate for federal agencies to broadly interpret their authorizing statutes as preempting state laws. When an administrative agency attempts to expand its role beyond the parameters of its authorizing legislation, the normal deference paid to administrative interpretation "cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. Nat'l Labor Relations Bd.*, 380 U.S. 300, 318 (1965).[14]

[14] Administrative officials, not subject to electoral constraints on their exercise of power, are less likely to understand or consider the consequences of preempting state law than are members of Congress. Wolfson, *Preemption and Federalism: The Missing Link*, 70 Hastings L. Rev. 69, 101 (1988).

B. FERC's Current Interpretation Of The FPA Is Inconsistent With Contemporaneous Administrative Construction Of The Statute.

FERC's suggestions that the FPA grants FERC a broad preemption of state authority over hydropower water rights are suspect, because they are inconsistent with its contemporaneous construction of the statute. Up until 1946, FERC's predecessor, the Federal Power Commission (FPC), consistently interpreted the FPA as requiring hydropower licensees to obtain their water rights under state law. It was only after the *First Iowa* decision that the FPC adopted its present interpretation of the FPA. In its 1946 annual report, the FPC stated that its changed interpretation was based on the Supreme Court's decision, not on its own independent analysis of the FPA. Fed. Power Comm'n, Twenty-Sixth Annual Report, at 92-94 (1946).

When an agency changes its administrative interpretation, the greater value attaches to the prior construction. "Peculiar weight" is accorded the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933) (emphasis added); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-668 (1979), *see also* 1 Davis, *Administrative Law Treatise* ¶ 5.06, at 324 (1958).

Prior to 1946, the FPC consistently maintained that federally-licensed hydropower projects must fully comply with state water laws. Indeed, the FPC went so far as to find that the states have the right to "veto" projects that are unable or unwilling to comply with state laws. In its first annual report, the FPC noted that it had deferred issuing licenses to several major water projects that had failed to acquire water rights under state law, stating that

"[i]n several of the States, particularly in California, action upon applications is awaiting the approval of water rights as required by section 9(b) of the act." Fed. Power Comm'n, First Annual Report, at 27 (1921).[15]

In 1922, the FPC's Chief Legal Counsel issued a formal opinion declaring that section 9(b) requires compliance with state water law, and the opinion was approved by the FPC on January 24, 1922. The opinion stated that:

> *The applicant [for a license] must show that he has obtained, pursuant to the laws of the State, the right to appropriate, divert, and use the water for power purposes.* If the applicant has obtained, in compliance with the laws of the State, a permit for the proposed diversion, from the State engineer or other agency of the State having jurisdiction in the matter, such a permit, in my opinion, satisfies the requirement of the statute.

Fed. Power Comm'n, Second Annual Report, at 225 (1922) (emphasis added).

In 1923, the FPC's annual report described more fully the view expressed in the Chief Legal Counsel's opinion in the prior year. The report stated that:

> There is a need of harmonious action between the Nation and the States and between State and State, not only in matters of water-power development, but in the whole field of public utility relations. *The determination of a policy is, However, a responsibility of the States themselves.* The Federal Power Commission in appreciation of the desirability of common action may recommend a course which it believes should be pursued,

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[15] The State of California has lodged FERC's annual reports, opinions and decisions cited herein with the Clerk of this Court. The amici request that the Court take judicial notice of these documents under Rules 201(b), -(d) and -(f) of the Federal Rules of Evidence. California lodged the same documents with the clerk of the court below with a similar request.

> and it will, of course, exercise such authority as it has to protect, if necessary, the common interest of all the States; *but it is too thoroughly convinced of the desirability of the maintenance of State sovereignty within its legitimate sphere and of the exercise of individual State responsibility to have any intention of dictating a domestic policy for any State.*

Fed. Power Comm'n, Third Annual Report, at 8 (1923) (emphasis added).

In 1924, the FPC considered a controversy virtually identical to the instant one. A California developer applied to the FPC for a license to build a hydropower project that threatened to impair a fish resource in California's Klamath River. The FPC ruled that the project operator must acquire an appropriative water right permit under California law, and that California could impose conditions in the permit to protect the fishery resource, including conditions requiring construction of a fishway on the dam or a fish hatchery. Fed. Power Comm'n, Fourth Annual Report, at 10-11 (1924). The report stated that:

> *The development of water power on the lands of the United States requires the approval of both the State and Federal Governments, the former granting the right to use the water, the latter the right to use the land. Under the Federal water power act a license may not be issued until an applicant has secured its water rights from the appropriate State authority.* Under such circumstances it is apparent that development can proceed only when the State and the Federal Governments take corresponding action. [¶] . . . The authority to determine whether a dam shall or shall not be constructed

> rests with the State department of public works.[16]

Id. at 10, 11 (emphasis added). The FPC's position in 1924 concerning California's authority to protect the Klamath River fishery is directly contrary to FERC's position in this case concerning California's authority to protect the Rock Creek-American River fishery.

In 1927, the FPC's annual report repeated the view that state water laws apply to projects licensed under the FPA. Fed. Power Comm'n, Seventh Annual Report, at 3 (1927). The report specifically stated that the states have the right to "veto" projects that fail to comply with state laws:

> When it is necessary for both State and Federal agencies to give approval to a project before it can be built, and when certain features of a project such as its design and construction are within the authority of both agencies, it is obvious that there are possibilities of conflict, and that *it is possible for either agency to halt development by interposing its veto.*

Id. at 4 (emphasis added).

In 1931, the FPC's annual report reaffirmed that state water law applies to projects licensed under the FPA, stating that:

> The Federal Government approaches the matter of the control of water for hydroelectric purposes from two avenues: (1) By reason of the ownership of lands containing power possibilities, and (2), by such control as it may have over the navigable waters of the United States by virtue of the commerce clause of the constitution. But while the Federal water power act

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[16] The California Department of Public Works is the predecessor of the State Water Resources Control Board. Cal. Water Code § 179.

> clearly provides a policy of protecting these Federal interests, at the same time it appears that *Congress, in this legislation, perhaps more than in any other piece of legislation on similar subjects, has sought to protect and preserve to the States not only the rights, privileges, and benefits of the State in the resource itself, but its power, through local governmental action, to regulate and control the resources thus developed to the advantage of its citizens.*

Fed. Power Comm'n, Eleventh Annual Report, at 12 (1931) (emphasis added).

Later in the 1930's, the FPC issued several opinions and decisions in specific cases reaffirming its view that state water laws apply to federally-licensed hydropower projects. *In re East Bay Municipal Utilities Dist.*, 1 Opinions and Decisions of the Federal Power Commission 13 (1932)(hereinafter FPC Reports); *Clarion River Power Co.*, 1 FPC Reports at 361-62 (1937); *Broad River Power Co. and Lexington Water Power Co.*, 1 FPC Reports at 365-66 (1937).

The above citations demonstrate that in the years immediately following enactment of the FPA, the FPC consistently construed the FPA as requiring hydropower projects to comply with state water laws. Since "peculiar weight" is accorded the "contemporaneous construction" of a statute by the agency charged with its enforcement, *Norwegian Nitrogen Co. v. United States, supra*, 288 U.S. at 315, the FPC's contemporaneous interpretation supports the view that applicants for federal hydropower licenses must comply with state water laws and is entitled to substantial deference by this Court. FERC's "current interpretation, being in conflict with this initial position, is entitled to considerably less deference." *Watt v. Alaska*, 451 U.S. 259, 273 (1981). It should be found "wholly unpersuasive" here. *Id.*

III. IN ENACTING THE FEDERAL POWER ACT, CONGRESS RECOGNIZED THAT STATE REGULATION OF WATER WOULD BEST PROTECT THE PUBLIC WELFARE.

A. FERC Does Not Have the Ability or the Resources to Make Water Allocation Decisions.

FERC's assertion of authority to allocate water for hydropower water projects has disrupted, and will continue to disrupt, the ability of the states to regulate and allocate water. Although many think that hydropower facilities merely use the natural flow of a river without otherwise affecting stream flows, quite the opposite is true. Hydropower facilities affect stream flows in at least three ways. First, hydropower facilities often store water for release at times of peak power demand. Second, some hydropower facilities divert most if not all of the water from a stream into penstocks, thus, de-watering a reach of the stream. Third, the operation of hydropower facilities can cause rapid fluctuations in the flows of a river. Each of these effects will have a dramatic impact upon existing and future water uses, fisheries, recreation and aquatic habitat. Thus, if states are precluded from regulating use of water for hydropower facilities, the stability of all other state created water rights will be undermined.

Aside from disrupting existing water rights and stream uses, FERC regulation of water used for private hydropower projects prevents development of future upstream uses of water and effectively precludes state allocation of its finite water supplies. FERC usually requires that a hydropower project be designed to use all available stream flows even though the flows may be available only a fraction of the time. Thus, the full reliable water supply upstream from a project, including all tributary water, is locked up and unavailable for other uses of greater public necessity.

State allocation procedures are not limited to the protection of existing water uses, but also balance proposed uses of water as well as account for the public's interest in the use of water for wildlife, recreation, aesthetics and other public uses. *E.g.*, Alaska Stat. § 46.15.080 (1987); Or. Rev. Stat. § 537.170 (1989); Utah Code Ann. § 73-3-8 (1989). Each water allocation decision is based upon extensive water right files, hydrologic data, state water plans, and public testimony. If hydropower projects, which generally are one of the biggest water users within a river basin, are exempted from the state decision making process, then the entire process will be severly undermined. States will have no way to account in their allocation decisions for future hydropower projects that FERC might authorize.

FERC asserts that it has the ability to usurp the states' traditional role of water allocation. For example, in *Horseshoe Bend Hydroelectric Company*, 42 F.E.R.C. ¶ 61,072 (1988), the State of Idaho requested that FERC include in its hydropower license a condition recognizing the state's policy of subordinating hydropower project water use to future upstream uses. Idaho made the request because it anticipated that water from the river would be needed to support future upstream development. Instead of deferring to state water law as it had in the past,[17] FERC took upon itself to determine on a case-by-case basis whether to allow future upstream development which might affect the use of water for hydropower generation, stating:

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[17] Idaho's request for a provision recognizing the state's subordination of the hydropower project's water right was not unique. Past FERC licenses have contained clauses recognizing subordination of project water rights to future upstream consumptive use. See, Idaho Power Co., 14 Fed. Power Comm'n Reports 71, 81 (1955).

> [W]e can require the licensee to reasonably reduce its use of water for generation to coincide with reductions in flows caused by future upstream diversion if we, after consideration of all aspects of the public interest, including the need for the upstream diversion and the impact of the diversion on project generation, finances, and environmental protection measures, conclude that it would be in the public interest to accommodate such upstream diversions.

Id. at 61,325.[18] FERC based its decision upon its duty to prepare comprehensive plans pursuant to section 10 of the FPA.[19]

The "comprehensive planning" powers of FERC are no substitute for the comprehensive procedures developed by the states to balance competing uses when allocating water. Indeed, FERC itself does not prepare comprehensive plans, but instead asserts that the comprehensive planning requirement of section 10 is met by the aggregate of information developed in the record of a licensing proceeding. *City of Fort Smith*, 42 F.E.R.C. ¶ 61,362, at 62,056 (1985).

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[18] FERC's assertions that subordination of hydropower water rights will undermine the viability of a project are without foundation. Under Idaho law, the decision to reallocate water from hydropower must be found by the state to be in the public interest. See, Idaho Code §§ 42-203A – 42-203C (Supp. 1989).

[19] Section 10 directs FERC to ensure that hydropower projects are "best adapted to a comprehensive plan" fulfilling various purposes, including improvement and protection of interstate commerce, water-power, recreation, and fish and wildlife. 16 U.S.C. § 803 (Supp. V 1987). The comprehensive planning process embodied in section 10 is not exlusive to FERC. Indeed, FERC is required to ensure that the project is consistent with comprehensive plans prepared by the states. *Id.* § 803(a)(2).

Such federalization of water allocation is unworkable. A set of hearings for the limited purpose of granting a single hydropower license cannot substitute for the complex and comprehensive processes developed by the states for the allocation of water. FERC does not have at its disposal nor can it develop and review the extensive state water rights, records, hydrologic data and other information necessary to make an informed decision regarding the future water needs of a state. Further, as an agency created solely for the purpose of regulating power development, FERC has an inherent and inevitable bias in favor of hydropower uses. States, on the other hand, are free to balance competing interests and reach decisions that maximize the benefits of hydropower development while minimizing the effect on other users. Thus, state control over water allocation best promotes the general public welfare, a fact recognized by Congress when it deferred to state authority over hydropower water rights.

B. Section 27 Recognizes State Authority To Place Conditions Upon Hydropower Water Rights To Further State Interests.

This Court has consistently rejected any suggestion that the national interest would justify imposing a federal regime of water rights regulation upon the states.[20] In

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[20] Any argument that the promotion of hydroelectric development is an important national policy that overrides state and local interests is muted, if not entirely eliminated, by the passage of the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-945, 100 Stat. 1243 (1986). Section 3 of the Act indicates that hydroelectric development is not an overriding national policy by requiring FERC to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 100 Stat. at 1243.

Kansas v. Colorado, 206 U.S 46, 85-95 (1907), it was held that the federal government could not interfere with the ability of each state to adopt its own unique water law system, whether it be the riparian doctrine, the appropriation doctrine, or a combination of the two. The principle embodied in *Kansas* remains valid today. In *California v. United States*, the Court stated:

> The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences.

438 U.S. at 648. The Court went on to find that the physiographic differences between the states led to the development of differing water law doctrines in the several states. Such differences were also found to be a primary factor in the traditional deference Congress has paid to state regulation of water.

The Court's reasoning in *California*, allowing states to impose conditions on water rights granted to federal reclamation projects, applies even more strongly to water rights granted for private hydropower projects. Unlike federal reclamation projects there is no specific national policy behind these private hydropower projects. Indeed, Congress recognized this fact and included section 27 to ensure that states would have the same control over hydropower water rights that they have over other appropriators. *See, e.g.*, 51 Cong. Rec. 14071 (1914) (remarks of Rep. Taylor).

Congress in enacting the FPA was guided by the same concern this Court so eloquently stated in California v. United States, in regard to the Reclamation Act of 1902. "[L]egal confusion . . . would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 669.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Ninth Circuit Court of Appeals and disavow this Court's dictum in *First Iowa* regarding the operation of section 27. Such action will restore the intended deference of Congress to state control of water rights for hydropower projects licensed under the Federal Power Act.

Respectfully submitted,

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No. 89-[illegible]

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF COUNTY OF INYO, BISHOP CREEK WATER ASSOCIATION, FRIENDS OF BISHOP CREEK, and WALLACE E. CRITTENDEN

As Amici Curiae
In Support of the Petitioner

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No. 89-333

In the Supreme Court
of the
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BRIEF OF COUNTY OF INYO, BISHOP CREEK WATER ASSOCIATION, FRIENDS OF BISHOP CREEK, and WALLACE R. CRITTENDEN

As Amici Curiae in Support of the Petitioner

INTERESTS OF THE AMICI CURIAE

Amici curiae County of Inyo, Bishop Creek Water Association, Friends of Bishop Creek, and Wallace R. Crittenden share an interest in maintaining the flow of Bishop Creek, rising in the eastern ridge of the Sierra Nevada and coursing through the community of Bishop to its confluence with the Owens River. The County of Inyo is the political subdivision of the State of California through which the entire course of Bishop Creek runs. The Bishop Creek Water Association, composed of the owners of water rights in lower Bishop Creek, has administered those rights by mutual association and self-government for more than half a century. The Friends of Bishop Creek and Wallace R. Crittenden are residents in the West Bishop community who individually hold and enjoy the rights to the existing flow of lower Bishop Creek.

The amici's interest in the flow of Bishop Creek is prejudiced by the application of Rancho Riata Hydro Partners, Inc. (engineered by the same Joseph R. Keating who initiated the Rock Creek Partnership proceedings in the case before the Court) for construction of a small hydroelectric project along Bishop Creek and upstream from the uses of the resident amici. The Rancho Riata Partners' application is presently pending before the Federal Energy Regulatory Commission (FERC), awaiting determination of the petition for rehearing filed by the amici.

At issue in the present FERC application of Rancho Riata Partners is the amenability of Rancho Riata Partners' application to conditions that may be imposed on the hydroelectric project by the State of California; or stated conversely, the degree to which a FERC

license, if issued, would interfere with the administration of California water rights in Bishop Creek.

The amici therefore share the interest of their State government, ably represented in this proceeding by the Attorney General, to govern the *conditions* under which water rights are exercised in the operation of a FERC-licensed hydroelectric project. The amici do not wish or need to reargue the doctrines of federal preemption and Congressional intent cogently presented by their Attorney General and the amici sister states through the Attorney General of Idaho. Rather, by virtue of their practical experience as frustrated participants in FERC's regulatory proceedings, amici wish to offer the Court a pragmatic perspective on the harm that would flow nationwide were the Ninth Circuit's decision, reposing in FERC the preemptive authority to establish streamflow conditions, to become the law of the land.

SUMMARY OF THE ARGUMENT

Amici draw on their own experience to assert that as a practical matter, FERC cannot fairly and efficiently assume the nationwide responsibility for stream administration that the Ninth Circuit's decision presumes. FERC's self-imposed limitations on generous public participation, its distance from and ignorance of the hydrologic realities of the humble streams that give life to the high desert, and its workload will continue to frustrate a fair and timely resolution of water disputes in all regions of the country. Congress therefore wisely chose to repose the conditioning of water rights exercise in the States.

Amici also draw on their historical research to demonstrate (again, as a practical matter) that the

subsequent history of *First Iowa Hydro-Electric Cooperative v. Federal Power Comm.*, 328 U.S. 152 (1946) shows that the Federal Power Commission (FPC) had wisely asked the Court in that case to honor the States' interest in water rights administration. *First Iowa* has produced no dam, no hydropower, but decades of headaches for the commission and the State of Iowa. Therefore this Court should welcome the opportunity to correct the Ninth Circuit's misplaced reliance on the *First Iowa* decision.

ARGUMENT

I. THE FEDERAL ENERGY REGULATORY COMMISSION CANNOT FAIRLY AND EFFICIENTLY ASSUME A NATIONWIDE RESPONSIBILITY FOR STREAMFLOW ADMINISTRATION.

The grandiloquent titles of the Federal Power Act and the Federal Power Commission (now succeeded by the Federal Energy Regulatory Commission) evoke images of national administration over great dams on mighty rivers such as the Columbia and the Colorado. In reality, however, the Court's decision in the present case will not affect our grandest interstate resources and thoroughfares of commerce, but rather the hundreds of humble streams confined, like Rock Creek in the instant case or Bishop Creek in the case of the amici, to the borders of one county, with lengths measured in tens of miles and flow in tens of cubic feet per second. The experience of the amici shows that when Congress in section 27 of the Federal Power Act reposed plenary power in the States to govern the flow of these tributaries, it honored the practical limitation of a distant federal bureaucracy to administer streams such as Rock

and Bishop Creeks.

Consider the case of Bishop Creek. At issue in the Rancho Riata Partners' application is 30, perhaps 60, cubic feet per second of flow; modest to those accustomed to the Potomac, but life- and environment-sustaining to the high desert dwellers of the Owens Valley. In initially granting the application of Rancho Riata Partners' predecessor, FERC concluded that the project would not harm the amici because the project flow would be returned to Bishop Creek upstream of the resident amici's uses. *Symons*, 42 FERC ¶ 61031 (1988). This conclusion, originating with an assertion in FERC's environmental impact statement, Final EIS, Owens River Basin, Seven Hydroelectric Projects, California, at 4-43 (1986), is simply wrong, as combining the maps on two separate pages of the EIS reveals, *id.* at 2-14, 2-15. (The combined maps, page 7-A of the amici's brief before FERC in support of petition for rehearing, appear as appendix A to this brief.) Rancho Riata Partners' project would take water and remove it permanently from Bishop Creek, returning it to the Owens River by a separate ditch system that bypasses the resident amici's uses.

Before FERC issued its licensing decision, resident Crittenden and the Bishop Paiute Indian Tribal Council had formally intervened in the FERC proceedings. Following the decision, Crittenden and the Indian Tribe sought rehearing; because the Indian Tribe's petition arrived in Washington one day late (having been mailed from Bishop within 30 days of the FERC decision), FERC summarily rejected it. After FERC's decision, the California Department of Fish and Game, City of Bishop, and Bishop Creek Water Association sought leave to intervene and protest; these interventions were

denied as untimely. By the fortune of individual Crittenden's timely intervention and petition for rehearing, one man's protest survives; it remains within FERC's discretion whether to hear on the merits the protests of the California Department of Fish and Game, County of Inyo, City of Bishop, Bishop Paiute Indian Tribal Council, and Bishop Creek Water Association.

The amici presented their briefing in support of their protests nearly two years ago. Approximately one year ago amici received unconfirmed reports from their supporting Congressman and FERC staff that FERC might soon decide the petitions for rehearing and intervention. Accordingly, counsel for the protestants (and amici) wrote to FERC to obtain in advance of the commission's meeting: notice of the meeting in time to arrange travel from California, a copy of the staff recommendation in time to comment on it, and opportunity to address the commission in support of or opposition to the staff recommendation. (Amici's counsel's letter to FERC appears as appendix B to this brief.)

One month later FERC's general counsel responded to amici's counsel, explaining that the FERC meetings are not those "in which the Commission invites the public to participate," that "the public and parties to proceedings before the Commission for a decision have no 'right' to participate in the Commission's deliberations," and that "[t]he public is not entitled to comment on or debate the advisory staff's recommendations to the Commission." (The general counsel's response to amici's counsel appears as appendix C to this brief.)

Three months ago Rancho Riata Partners complained

to FERC that its delay in decision was prejudicing the *applicants'* interest in the project: "FERC by its lack of action in these types of matters is basically making an indirect decision lending support to a no project conclusion." Rancho Riata Partners' motion for expedited action on pending appeals (Oct. 23, 1989).

To date FERC has made no decision on the pending rehearing application of Crittenden and intervention and rehearing applications of the other amici.

This record belies FERC's ability to administer streamflows as the Ninth Circuit's decision anticipates:

1. FERC eliminates public participation by rigid and harsh enforcement of procedural rules pertaining to intervention and rehearing petitions. (In contrast, for example, the U.S. Forest Service broadly solicits public commentary, and generally places substance before form in allowing valuable comments to be considered.)

2. FERC fails to accord proper deference to the *public authorities* charged by the law of California with the protection of their citizens' environmental and natural resources. FERC similarly fails to recognize the great interest of the local Indian tribe.

3. FERC premised a decision vital to the affected local citizenry on a plainly erroneous reading of its own record.

4. FERC apparently cannot timely correct its error once presented with evidence of the error.

5. FERC does not invite public review of staff proposals in time to allow public comment prior to commission decision.

6. FERC does not invite public participation in its own proceedings.

7. FERC's inability to complete its workload prejudices project applicants, interested local government, and citizens protestants alike.

Amici's assessment of FERC has been reflected in findings of the Congress itself, expressing frustration at FERC's unwillingness to accord proper recognition to citizen-objectors, and FERC's reluctance to honor intervenors' claims that environmentally harmful projects should not be licensed. House Conf. Rep. No. 99-934, 99th Cong. 2nd Sess. 21 (1986) ("The provisions are adopted with a view of not merely codifying existing practice at . . . FERC . . . but to change and improve it."); House Rep. No. 99-507, 99th Cong. 2d Sess. 17 (1986) ("In short, FERC's treatment under the Federal Power Act and applicable environmental laws . . . has been less than satisfactory."). Unfortunately not even these findings have benefited the amici, as reflected in FERC's subsequent transactions with them.

In contrast to their experience before FERC, the amici over the years have come to expect from the California Water Resources Control Board a welcoming of and responsiveness to "public participation" from local government and citizens. California may be the nation's largest state in terms of both population and wealth of natural resources (and as frequently observed, in its own right one of the world's leading economies), but in matters of water, where small quantities make great differences in the quality of life, the state water board and its staff do not act in geographic or institutional isolation from its constituencies. The record in the present case exemplifies this state board's knowledgeable

adjudication of a small stream dispute. When a proceeding is instituted, staff members visit the affected locale frequently, establishing on-going personal contact with affected parties. When a staff recommendation is completed, public release follows so that both its technical accuracy and political feasibility can be tested in the public arena before the board takes final action. *A fortiori*, the rules of public participation are administered flexibly and toward the end of promoting well-informed and broadly-accepted decisions. *See, e.g.*,23 Cal. Code Regs § 761(a) ("In addition to applicants, petitioner and protestants of record, the board . . . may recognize as interested parties other persons appearing at a hearing. Upon being so recognized, interested parties may participate in the proceedings."); *see generally* 23 Cal. Code Regs. §§ 745-771.

Recognizing that such procedures must govern the administration of water, especially in the arid states beyond the hundredth meridian, Congress wisely in section 27 reposed that governance in the respective States, and not within a distant and isolated federal bureaucracy.

II. THE SUBSEQUENT HISTORY OF *FIRST IOWA* VALIDATES THE FEDERAL POWER COMMISSION'S ATTEMPTED DEFERENCE TO STATE LAW IN THAT CASE.

The petitioner and respondents in the present case debate the applicability of *First Iowa Hydro-Electric Cooperative v. Federal Power Comm.*, 328 U.S. 152. The petitioner's opening brief, and in particular its recitation of legislative history and application of *California v. United States*, 438 U.S. 645 (1978) to the language of

section 27, show that regardless of the Court's interpretation of section 9(b) in *First Iowa*, that interpretation cannot read a preemptive federal mandate into section 27.

In the petitioner's view, to which the amici subscribe, *California v. United States* represents an intervening doctrinal development that vitiates the Ninth Circuit's interpretation of *First Iowa*. Amici submit that the subsequent history of *First Iowa* itself challenges the Ninth Circuit's reading.

First Iowa arose when the Federal Power Commission *denied* the cooperative's application for a license because it *agreed* with the State of Iowa that the applicant first had to apply for a state license. *First Iowa Hydro-Electric Cooperative*, 4 F.P.C. 27, 30 (1944). The commission believed that under these circumstances of no state *application*, section 9(b) required the FPC application to be dismissed, because Iowa had no opportunity to express itself on the proposed project. *See* 328 U.S. at 188 (dissenting opinion, quoting brief of the Solicitor General).

This Court vacated the FPC's denial, holding that section 9(b) did not require the *issuance* of a state permit. 328 U.S. at 164. The FPC, on remand, granted a 50-year license, notwithstanding the State of Iowa's objection to the project's feasibility. *First Iowa Hydro-Electric Cooperative*, 6 F.P.C. 227 (1947). The licensee was required to commence construction within two years, complete it within four years, and within ninth months submit evidence of financial feasibility. *Id.*

Although the First Iowa Cooperative succeeded in convincing the FPC, over the State's objections, that the

project was feasible, *First Iowa Hydro-Electric Cooperative*, 7 F.P.C. 892 (1948), in fact it has never completed the dam. In 1959 the FPC referred to matter to the Attorney General to initiate license revocation proceedings, finding that "with the exception of a small amount of land clearing and leveling which took place two days before the final date specified for commencement of construction, no work has been done on the project." *First Iowa Hydro-Electric Cooperative*, 21 F.P.C. 244 (1959). But still First Iowa hung on to its paper entitlement, and 14 years later the commission once again had to cite First Iowa's delinquencies and again seek a revocation of the license, observing: "In short, the history of this project is most disappointing. At about the halfway point of the 50-year license, it is doubtful whether this project will ever become a reality." *First Iowa Hydro-Electric Cooperative*, 50 F.P.C. 1864 (1973). The last appearance of this matter in the commission's reports shows that that 1973 reference to the Attorney General had not been accomplished, and once again ordered the revocation to be initiated. *First Iowa Hydro-Electric Cooperative*, 55 F.P.C. 534 (1976).

From this reading of the bare legal record, the amici can only imagine the hundreds or thousands of hours that commission staff, the State's attorneys, and the protesting citizens have been forced to invest in an enterprise whose sole achievement over four decades was to preempt the Cedar River from alternative development or preservation. When all was said and done, the State of Iowa perceived more accurately than the FPC the capabilities and limitations of the State's water resources.

We urge this Court to ask, as the amici themselves have questioned, if the administration of the nation's

water resources under the Federal Power Act will not benefit by greater deference to State Law and State proceedings than that engendered by FERC's and the Ninth Circuit's interpretations of *First Iowa*. The *First Iowa* history validates the amici's assertion that as a practical matter state water law and state water proceedings deserve more deference than *First Iowa* accorded. Not only should section 27 be read to authorize the maintenance of State conditions on the exercise of water rights. Section 9(b), if the occasion arises in this or a future case, should at least require the applicant to *file* for a state water permit, and likely pursue it far enough to determine the conditions under which it would be issued, before initiating federal proceedings that may require decades of FERC involvement and produce only the maintenance of a speculative priority on the affected river or stream.

CONCLUSION

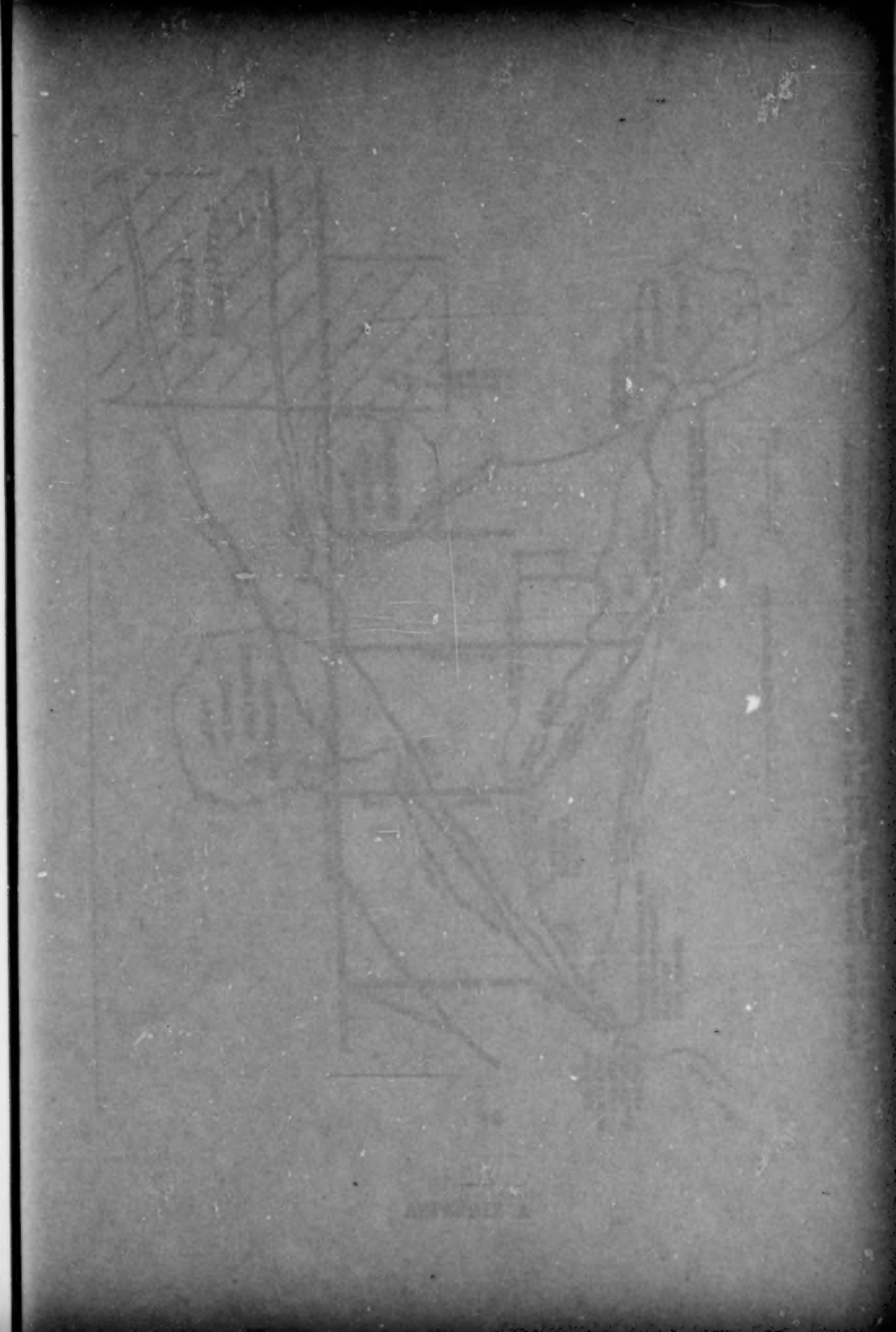
The practical factors addressed by the amici support the doctrinal position of California and her 43 sister states that section 27 wisely preserves to the States the authority to define the exercise of water rights within the States.

Dated: January 10, 1990

Respectfully submitted,

ANTONIO COSBY-ROSSMANN

Special Counsel to the
County of Inyo
Counsel for Amici Curiae



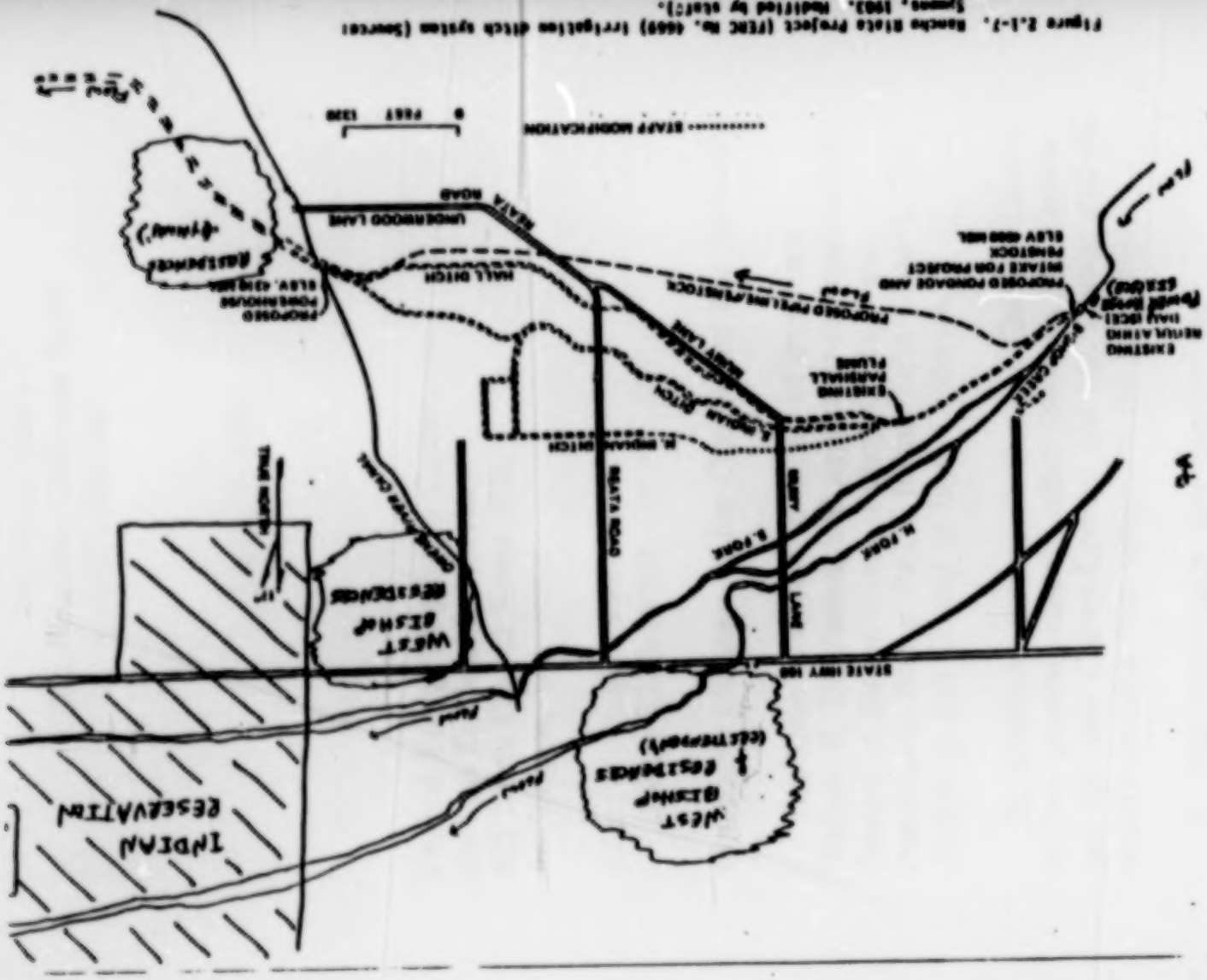


Figure 2.1-7. Rancho Bluto Project (FERC No. 4669) irrigation ditch system (Source: Symons, 1983. Modified by staff).

ANTONIO COSBY-ROSSMANN
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March 7, 1989

Federal Energy Regulatory Commission
c/o Lois D. Cashell, Secretary
825 North Capitol Street, N.E.
Washington, DC 20426

RE: Project 4669-002
Docket EL85-19-102

Honorable Members of the Commission and Secretary:

This letter is written in behalf of intervenor Wallace R. Crittenden, and applicants-for-intervention Friends of Bishop Creek, Bishop Creek Water Association, Bishop Paiute Indian Tribe Council, City of Bishop, and County of Inyo, California.

By telephonic communication with Quentin Lawson of your general counsel's office (between Mr. Lawson and the Inyo County Counsel and Mr. Lawson and this writer) we have been advised of the following:

1. The Commission may consider the

APPENDIX B

above-referenced matter soon (15 or 29 March unlikely, but 12 or 26 April more likely);

2. The staff recommendation to the Commission would not normally be available until the morning of the hearing;

3. The agenda of the Commission, setting the hearing date, would not be available on more than one week's notice.

Under these circumstances, we find it difficult, and very likely impossible, to address the Commission in either support of or challenge to the staff recommendation. We assert that due process requires meaningful advance notice of the date of hearing, meaningful advance receipt of the staff's recommendation, and of course meaningful opportunity to address the Commission on the staff's recommendation.

We request that the Commission, Secretary and staff grant us the meaningful due process outlined above. "Meaningful," in light of the distance involved, the importance of this matter to the Owens Valley community, and the nature of the issues, in our view requires that we receive the agenda and staff report at least two weeks prior to the hearing; and be afforded opportunity to address the Commission both in writing and by oral argument in advance of the submission of the matter for decision.

Kindly provide us with the notice and opportunity described here. Without waiving our claim that we are constitutionally and statutorily entitled to the notice

and opportunity here requested, we request as a minimum that we receive telephonic or facsimile notice of the meeting at which this matter will be considered by the Commission. This writer's facsimile number is (415) 861-1822; Inyo County's is (619) 873-5695.

Thank you for your attention to this request.

Yours sincerely,

/s/

Antonio Cosby-Rossmann
Counsel for Wallace R. Crittenden, et al.

ACR/cas
cc: Fred Springer, Director, Hydropower Licensing
Quentin Lawson, Esq., General Counsel's Office
Rancho Riata Hydro Partners
John L. Symons
County of Inyo
City of Bishop
Bishop Paiute Indian Tribe Council
Friends of Bishop Creek
Wallace R. Crittenden

FEDERAL ENERGY REGULATORY COMMISSION

Washington, D.C. 20426

April 10, 1989

Antonio Cosby-Rossmann, Esq.
380 Hayes Street
San Francisco, CA 94102

Dear Mr. Cosby-Rossmann:

This responds to your March 7, 1989 letter to the Federal Energy Regulatory Commission (Commission). In your letter you asked that the Commission provide you, as counsel for an intervenor and certain applicants-for-intervention, a copy of the Commission Meeting Agenda and any advisory staff recommendations that the Commission will discuss at its meeting at least two weeks in advance of the meeting. You claim that you are entitled, as a matter of "due process" to meaningful advance notice of the date of the Commission "hearing," advance receipt of the advisory staff's recommendation and an opportunity to address the Commission on the advisory staff's recommendations.

You misunderstand the nature of the Commission's meetings. These mettings [sic] are not "hearings" in which the Commission invites the public to participate. Moreover, they are not "hearings" in the sense of contested proceedings before an Administrative Law Judge. The purpose of Commission meetings is for the Commissioners to deliberate and discuss the

Commission's business and consider the advice of the Commission staff on each item of business. To the extent that the Commission meetings fall within the definition of "meetings" as contemplated by the Government in the Sunshine Act (5 U.S.C. § 552(b)), the Commission opens its meetings to the public. However, under the Administrative Procedure Act (5 U.S.C. § 551, et seq.), the public and parties to proceedings before the Commission for a decision have no "right" to participate in the Commission's deliberations. Indeed, the Freedom of Information Act (FOIA) protects the deliberative process among the Commissioners and between the Commission and its advisory staff. 5 U.S.C. § 552(b)(5).

The Commission staff referred to in your letter is advisory staff whose function is to assist the Commission in its decisional process. The public is not entitled to comment on or debate the advisory staff's recommendations to the Commission. Indeed, the deliberative process privilege recognized by the FOIA protects staff advice from public scrutiny and comment.

At this point, the Commission has not scheduled any public hearings on Project No. 4669-002, Docket No. EL85-19-102. In the event the Commission schedules public hearings on any matters related to that docket, the Commission will provide adequate advance public notice that will permit you to participate on behalf of your clients.

I hope that this information will be helpful.

Sincerely,

/s/

Catherine C. Cook
General Counsel

No. 89-333

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
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v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether hydropower facilities licensed by the Federal Energy Regulatory Commission pursuant to the Federal Power Act are exempt from state minimum instream flow requirements, notwithstanding Section 27 of that Act, which provides that nothing in the Act "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" (16 U.S.C. § 821).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-333

STATE OF CALIFORNIA,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case is of interest to *amici* because it concerns the authority of a state regulatory agency to impose state law requirements on a private activity also regulated by a federal agency. The court of appeals in this case applied, in effect, a presumption in favor of preemption of any overlapping state authority, in ruling that where, as here, the Federal Energy Regulatory Commission has issued a license to a private entity to operate a hydro-

power facility, the state water regulatory agency cannot impose conditions on the facility's state water permit that are different in any way from those contained in the federal license. The court below reached this result notwithstanding the explicit savings language contained in Section 27 of the Federal Power Act, which preserves state laws "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" (16 U.S.C. § 821).

The court of appeals' ruling is significant to *amici* in two respects. First, it reflects an understanding of federal preemption that threatens to supersede countless important state regulatory programs. Overlapping state and federal regulatory requirements are the inevitable product of our federal system and not the presumptive trigger for federal preemption. Indeed, a contrary rule would be inconsistent with this Court's repeated admonition that preemption analysis "start[s] with the assumption that the historic police powers of the States were *not* to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). Nor is there any room for the court of appeals' view that the comprehensive nature of the federal regulatory scheme can support an inference of congressional intent to supersede overlapping state regulatory authority. Such inferences are permitted, if ever, only in the *absence* of express congressional guidance concerning the preemptive reach of a particular federal law.

Second, the court of appeals' ruling, if adopted by this Court, threatens immediate displacement of a critical area of traditional state concern: regulation of the use of water. Especially among the Western States, few matters are so central to the State's ability to safeguard the health and livelihood of its citizens as is the State's authority over water flowing within its borders. Hence, the court of appeals' view that Congress intended frag-

mentation of state authority by exempting federal hydropower licensees from any state oversight is extremely disturbing.

Amici submit that the decision of the court of appeals is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.*

STATEMENT

Amici adopt petitioner's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federalism provides strength to our legal system, but is simultaneously the source of much friction and the impetus for much compromise. Our laws reflect "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). At times, of course, the tensions that inevitably result from the operation of federal and state sovereign authority in overlapping spheres can become intolerable. In those instances, it is for Congress to decide how the conflict should be resolved and, in particular, to ascertain whether federal preemption of state law is warranted under the Supremacy Clause.

Perhaps because "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress" (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-51 (1985)), however, such congressional oversight typically results in a compromise of the federal and state interests.

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* The parties' letters of consent, pursuant to Rule 37 of the Rules of this Court, have been filed with the Clerk.

Congress rarely endorses sweeping preemption of overlapping state law. The same "national political process [that] systematically protects States from the risk of having their functions * * * handicapped by Commerce Clause regulation" curbs national efforts to supersede States' exercise of their historic police power authority to regulate in the public interest. *Id.* at 555; see, *e.g.*, *ETSI Pipeline Project v. Missouri*, 108 S.Ct. 805, 810 (1988) (discussing federalism concerns reflected in Flood Control Act, 33 U.S.C. § 701-1 (1952 ed.)).

The decision of the court of appeals, however, reflects an antagonism to state regulation of federally regulated activities that is antithetical to basic notions of federalism and inconsistent with this Court's established framework for ascertainment of congressional intent to preempt. The court improperly relied on inferential evidence of congressional intent to preempt state law in the face of explicit statutory language establishing that Congress struck a different compromise between federal and state interests.

Section 27 of the Federal Power Act directly refutes the court of appeals' ruling that hydropower projects licensed under that Act are exempt from minimum instream flow requirements imposed by state law. Section 27 commands that the Act shall not be "construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821. The state minimum instream flow requirement (imposed pursuant to Cal. Water Code § 1257 (West 1971)) that respondents here seek to evade is the very type of state law that Congress intended to preserve. It "relat[es] to the control, appropriation, use, or distribution of water used * * * for * * * other uses."

Contrary to the court of appeals' suggestion, there is no ambiguity in the literal terms of Section 27 that would support an alternative construction limiting its

scope either to the preservation of "state proprietary rights" or to state control of water for purposes "related" to irrigation or municipal uses. No such qualifiers appear in the language of Section 27. Nor is either suggested by any applicable canon of statutory construction.

Because, moreover, Congress expressly preserved state water law, it was improper for the court of appeals to infer congressional intent to preempt from the alleged "comprehensive" nature of the Federal Power Act's regulatory scheme. A court may rely on such evidence of *implicit* congressional intent to preempt only in the absence of *explicit* statutory language, such as that contained in Section 27, which defines the scope of federal preemption under the federal statute.

Nor may a court infer preemption based on an alleged "conflict" between federal and state law where, as in this case, toleration of such conflict was necessary to secure the federal statute's passage. The legislative history shows that many members of Congress were seriously concerned about the potential impact of federal water power legislation on state water law. The language contained in Section 27 was designed to address their concerns—even at the expense of the "comprehensive" federal regulatory scheme—and thus break the logjam that had long stalled congressional enactment of federal water power legislation prior to 1920. In such circumstances, a court may not substitute its vision of the best way to regulate hydropower for the political compromise actually struck by Congress.

Finally, this Court's decision in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), does not require a different result. The Court's discussion of Section 27 in *First Iowa* was technically dictum and should now be disavowed. Contrary to this Court's now settled precedent, the *First Iowa* Court's reading of Section 27 rested on a presumption *in favor of* federal preemption instead of the required presumption *against* federal preemption of traditional state police power au-

thority. *First Iowa* also relied heavily on an understanding of the meaning of Section 8 of the Reclamation Act —which served as the model for Section 27—that this Court has since disavowed in *California v. United States*, 438 U.S. 645 (1978).

ARGUMENT

PURSUANT TO SECTION 27 OF THE FEDERAL POWER ACT, HYDROPOWER PROJECTS LICENSED UNDER THAT ACT ARE NOT EXEMPT FROM STATE MINIMUM INSTREAM FLOW REQUIREMENTS.

The critical task "[i]n deciding whether a federal law preempts a state statute * * * is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); see *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Preemption may be either express or implied. Congress may, by explicit statutory language, declare the extent to which it intends to preempt certain state laws. *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987). Alternatively, in the absence of explicit congressional guidance, this Court will

> infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Northwest Central Pipeline Corp. v. Kansas Corporation Comm'n, 109 S.Ct. 1262, 1273 (1989). In all events, where, as in this case, a party is claiming "preemption

of state law in areas traditionally regulated by the States," there is a "presumption against finding preemption." *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989). The Court in these cases "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1665, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

In this case, that presumption cannot be overcome. There is no "clear and manifest purpose" evident in the Federal Power Act to preempt state authority to impose minimum instream flow requirements on those who possess a FERC license to operate a hydropower facility. Indeed, quite the opposite is true.

A. Section 27 Of The Federal Power Act Preserves State Authority To Impose Minimum Instream Flow Requirements On Federally Licensed Hydropower Facilities.

"The starting point for [the Court's] interpretation of a statute is always its language" (*Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166, 2172 (1989)). Section 27 of the Federal Power Act directly addresses the preemption issue raised by this case: whether Congress intended to preempt a State's authority relating to the control, appropriation, or use, of water used in hydropower facilities. Section 27 explicitly denies any congressional intent to prohibit such state laws. It declares that nothing in the Act "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821.

The exercise of state authority challenged in this case falls squarely within the four corners of Section 27. It is a state law "relating to the control, appropriation, use, or distribution of water used in * * * other uses." Here,

respondent Rock Creek seeks to appropriate the use of water for hydropower, and the State of California seeks to control that use for the purpose of protecting the competing values achieved by maintaining a minimum instream flow.[1]

Nor should this result be surprising. Power to preserve and regulate the exploitation of water is a traditional state function. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 950-51 (1982); *California v. United States*, 438 U.S. 645, 653 (1978). Congress wrote Section 27 in expansive terms, consistently with its "purposeful and continued deference to state water law" "in the reclamation of the arid lands of the Western States" (*California v. United States*, 438 U.S. at 653); see 33 U.S.C. § 1251(g) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Clean Water Act]."). [2] Congress has long understood the "highly interdependent" nature of water rights and the tremendous "legal

[1] The Solicitor General makes the curious suggestion that minimum instream flow may not amount to a "use" of water. See FERC Br. in Opp. 14 n.6. It is well settled, however, that "[w]ater use consists of (1) intake uses, (2) onsite uses, and (3) instream or flow uses" and that "[f]low uses include water for estuaries, navigation, waste dilution, hydroelectric power and also some fish and wildlife and recreational uses." National Water Commission, *Water Policies for the Future* 6 (1973). Most Western States, moreover, protect instream uses through instream flow laws. Johnson & DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 Nat. Res. J. 347, 361-67 (1989). Under California law, "recreation, fish and wildlife, and other uses are recognized as beneficial uses of water" and are protected "through water terms and conditions which require maintenance of bypass flows." *Id.* at 366, citing Cal. Water Code § 1243 (West 1971). But, in all events, it is enough that the State here is regulating respondent Rock Creek's "use" of water for hydropower purposes, which presumably all agree constitutes a "use" of water, within the meaning of Section 27.

[2] See Pet. Br. 18-22 (description of history of congressional deference to state water law).

confusion" that could result from the fragmentation of state authority. See *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976); *California v. United States*, 438 U.S. at 668-69. Because "water is a moveable, wandering thing," [3] a State cannot, as a practical matter, effectively regulate the use of water from a common source if certain users are exempt from state authority.[4]

It is, no doubt, for this reason that Congress included virtually no words of limitation in its express preservation of state authority to regulate the use of water. Section 27 denies any congressional intent to interfere with or affect such laws "in any way." And that provision deliberately extends its disclaimer of preemption beyond state regulation of water for irrigation or municipal uses to include regulation of water for "other uses."

In this case, therefore, Section 27 should be the end as well as the beginning of the Court's preemption inquiry. "[F]or where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1030 (1989), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).[5]

[3] 2 W. Blackstone, *Commentaries* *18.

[4] In its brief, the State provides concrete examples of the practical problems created by the court of appeals' exemption of FERC licensees from state water use regulation. See Pet. Br. 43-45.

[5] Because the statutory language is unambiguous, there is no occasion here to defer to FERC's construction, which contravenes Section 27's plain meaning. See *Public Employees Retirement System v. Betts*, 109 S.Ct. 2854, 2863 (1989); *ETSI Pipeline Project*, 108 S.Ct. at 817. But, in any event, FERC's current view does not appear to be the same as its predecessor's (Federal Power Commission's) initial contemporaneous reading of the Federal Power Act, which is the more weighty agency construction (*EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600, n.17 (1981)). FERC's predecessor appears to have read the Act, consistently with our view, as preserving state authority to apply its state water laws to federally licensed hydropower projects. See Pet. Br. 35

B. The Court Of Appeals' Failure To Honor The Plain Meaning Of Section 27 Is Not Justified By The Court's Assertion Of Ambiguity In Its Meaning, The Allegedly Comprehensive Nature Of The Federal Hydropower Licensing Scheme, Or Claimed Conflicts Between Federal And State Authority.

The court of appeals' finding of preemption in the face of Section 27 is flawed in three fundamental respects. First, the court invented ambiguity in the meaning of Section 27 where there is none. Second, the court improperly inferred congressional intent to preempt state water law based on the "comprehensive" nature of the federal licensing scheme for hydropower facilities under the Federal Power Act, notwithstanding Congress's explicit statement that no such inference should be drawn. Finally, the court inferred congressional intent to preempt based on a conflict analysis that wholly ignores that the Federal Power Act's passage was ensured only by the acceptance of such conflict within its statutory scheme.

1. The court of appeals' assertion that the meaning of Section 27 is ambiguous makes a mockery of this Court's repeated admonition that "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985), quoting *Richards v. United States*, 369 U.S. 1, 9 (1962). There is simply no merit to the court of appeals' conclusion that the language of Section 27 "can support two conflicting readings" (Pet. App. A8): (1) "limit[ing] state authority to the area of property rights involving water for irrigation, municipal use, and related activities" (*ibid.*);

n.17. Indeed, because the federal agency seems to have shifted its view in response to litigation—in cases such as *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946)—its current construction, for that reason alone, may not be entitled to judicial deference. *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 473 (1988).

or (2) "giv[ing] the states final authority over all issues connected to the control and use of water by a project licensed under the FPA" (*id.* at A9). Only the latter coincides with the ordinary meaning of the words of Section 27.

Section 27 preserves "the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, *or any vested right acquired therein*" (emphasis added). Hence, congressional intention to preserve "any vested right acquired" in water pursuant to state law is *in addition to* its intention to preserve state water regulatory authority generally and not to the exclusion of such continuing state authority.

Likewise lacking in merit is the court of appeals' conclusion that Section 27 can naturally be read as limiting state authority to "water for irrigation, municipal use, and related activities" (Pet. App. A8).[6] Section 27 preserves state authority relating to "water used in irrigation or for municipal *or other uses*" (emphasis added). The modifier "related" appears nowhere in the statute.[7]

FERC's contrary view (see FERC Br. in Opp. 14), must rest on the application of the principle of *ejusdem*

[6] This is the basis for the court of appeals' most narrow reading of Section 27, which is that even if the State possesses property rights in fish and fish uses, Section 27 is unavailing because it provides protection only to "municipal and irrigation proprietary rights" (Pet. App. A11 n.3).

[7] In *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954), this Court embraced the view that the language of Section 27 "is applicable to proprietary rights for power purposes," rejecting the contention that Section 27 is more narrowly confined. Because *Niagara Mohawk* concerned the propriety of the federal licensee's paying the expenses for the use of state water rights, the Court did not have to address the issue whether Section 27 protects *only* state proprietary rights. The Court's refusal, however, to limit Section 27 to "municipal" or "irrigation" uses is inconsistent with the court of appeals' narrow reading of "other uses" in this case.

generis, the canon of statutory construction expressing the notion that "where general words follow an enumeration of specific terms, the general words are read to apply only to other items like those specifically enumerated." *Garcia v. United States*, 469 U.S. 70, 74 (1984).[8] Reliance on this doctrine, however, is misplaced. "'[T]he rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.'" *Ibid.*, quoting *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980); *United States v. Turkette*, 452 U.S. 576, 581 (1981); see also *Cleveland v. United States*, 329 U.S. 14, 17-18 (1946). Here, as in *Garcia* ("other property of the United States"), *Harrison* ("any other final action"), and *Turkette* ("any union or group of individuals associated in fact"), there is no initial uncertainty requiring invocation of the principle. *Ejusdem generis* "cannot be employed to render general words meaningless, since that would be to disregard the primary rules, that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning." *Mason v. United States*, 260 U.S. 545, 554 (1923) ("other form of appropriation").[9]

Application of *ejusdem generis* is inappropriate also because the legislative history surrounding Section 27's

[8] See note 31, *infra*.

[9] In addition, application of the principle is not justified where, as in Section 27, the "terms in question are made separate and distinct from one another by Congress' use of the disjunctive" (*Garcia v. United States*, 469 U.S. at 75). Here, Congress has deliberately set "other uses" apart from "irrigation or municipal" in order to ensure the provision's expansive construction. Hence, application of *ejusdem generis* is not warranted because "it may not be used to defeat the obvious purpose of legislation." *United States v. Gooch*, 297 U.S. 124, 128 (1936); see *King v. United States*, 379 U.S. 329, 336-37 (1964) ("other person"); *United States v. Alpers*, 338 U.S. 680, 683-84 (1950) ("other matter of indecent character"); see also *Cutler v. Kouns*, 110 U.S. 720, 728 (1884) ("other crimes").

enactment (see pages 18-20, *infra*) establishes that Congress was aware of the potentially expansive meaning of adding "other uses" in the disjunctive. In particular, Section 27 was modelled after Section 8 of the Reclamation Act of 1902, which is virtually identical to Section 27, except that the Reclamation Act does not include the catch-all category "other uses" that the framers of Section 27 were careful to add.[10]

Finally, the court of appeals' narrow reading of Section 27 is precluded by this Court's decision in *California v. United States*, 438 U.S. 645 (1978). The Court in that case rejected a similarly narrow proposed construction of statutory language that is essentially identical to that contained in Section 27.

At issue in *California v. United States* was the meaning of Section 8 of the Reclamation Act of 1902, which provides that the Secretary of the Interior, in operating federal reclamation projects, must comply with state laws relating to the "control, appropriation, use, or distribution of water used in irrigation, or any vested right

[10] Nor did the addition of this phrase go unnoticed during the legislative process. Efforts were made to amend predecessor bills containing similar language in order to prevent a State from exercising the type of authority asserted by California here. See, *e.g.*, 51 Cong. Rec. 14066-67 (1914) (remarks of Rep. Mann) ("The provision says that any law that a State passes for any use of water shall prevail over this law."); *id.* at 14067 (remarks of Rep. Mann) ("Is the gentleman willing to accept an amendment to strike out the words 'and other,' in line 17"); *id.* at 14071 (remarks of Rep. Stevens) ("Not the same provision [as Section 8 of the Reclamation Act]. * * * It referred merely to irrigation. But you have got in here 'or other uses,' which covers the use of water for the development of power. It seems to give the State the authority to make laws governing the development of water power on these Government lands. The words 'or other uses' ought to be stricken from this section."). Because these efforts ultimately failed to prevent Congress from including the more expansive language, it would be especially improper now to use *ejusdem generis* to obtain the very result rejected by Congress in enacting the Federal Power Act. See *United States v. Mescall*, 215 U.S. 26, 32 (1909).

acquired thereunder" (43 U.S.C. § 383).[11] The Solicitor General, on behalf of the Secretary of the Interior in that case, like the Solicitor General on behalf of FERC in this case, resisted the plain meaning of the statutory language by positing that its sole legal effect was to require just compensation for any vested rights in water adversely affected by the federal activities. In a ruling directly applicable to the case at hand, the Court flatly rejected the Solicitor General's proffered construction. According to the Court, "Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'" 438 U.S. at 674-75.

Respondents try to avoid the obvious force of *California v. United States* by claiming that Section 8 of the Reclamation Act is distinguishable from Section 27 of the Federal Power Act. See FERC Br. in Opp. 15-16; Pet. App. A12; Rock Creek Br. in Opp. 10-13. Comparison of the language of the two provisions and the legislative history of Section 27's adoption, however, show that the only difference was Congress's intent in Section 27 to provide even *broader* protection of state water laws than that provided for in Section 8.[12] Section 27 was modelled after Section 8 of the Reclamation Act, but explicitly extended beyond water used for irrigation to include water for "municipal and other uses" (see pages 12-13, *supra*). In all other relevant respects, the two provisions are, as the court of appeals itself acknowledged, "virtually identical" (Pet. App. A9).[13]

[11] Section 8, 43 U.S.C. § 383, provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *.

[12] U.S. Br. in *California v. United States*, at 52 ("Section 27 * * * is similar to Section 8 of the Reclamation Act, but broader.")

Indeed, in light of the Solicitor General's prior repeated acknowledgements of the close relationship between Sections 8 and 27, his current position that "Sections 8 and 27 would properly be interpreted as parts of two quite different statutory schemes" is surprising. See FERC Br. in Opp. 16 n.9. In his briefs before this Court in *California v. United States*, the Solicitor General repeatedly analogized Sections 8 and 27. In discussing Section 8, he argued that the "same analysis has governed this Court's interpretation of comparable statutory provisions such as Section 27 of the Federal Water Power Act." U.S. Br. in *California v. United States*, at 23. The Solicitor General also referred to a decision of this Court construing Section 27 as "[p]erhaps the closest analogous case" because the "Court there interpreted a provision similar to Section 8" (*id.* at 51). Indeed, the

[13] The Solicitor General alternatively posits (Br. in Opp. 15-16) that Section 8 is distinguishable because, unlike Section 27, Section 8 further provides that the "Secretary of the Interior, in carrying out the provisions of this Act, shall proceed 'in conformity with' such [state] laws" (43 U.S.C. § 383). That is a distinction that makes no difference to the outcome of this case. Section 27 does not include comparable language for the obvious reason that under the Federal Power Act, unlike the Reclamation Act, it is generally private parties (not a federal agency) that must comply with state water law. Hence, there was no need in the Federal Power Act to include a specific provision declaring that the federal agency must itself comply with state water law.

In any event, this case concerns the scope of state authority preserved by the savings portion of Section 27, and Sections 8 and 27 are "virtually identical" in that respect. The additional language in Section 8 upon which the Solicitor General relies does not purport to increase the scope of laws preserved. Rather it expressly confines the Secretary's compliance to "such" state laws as are preserved by the first clause of the provision.

Solicitor General argued that the Court's holding in that earlier case "applies *a fortiori* here" (*id.* at 129).

Nor is the Solicitor General's recognition of the close relationship between Sections 8 and 27 either of recent vintage or confined to his representation of the Secretary of the Interior. In arguing over 45 years ago in favor of the very same narrow reading of Section 27 that he currently propounds, the Solicitor General, on behalf of the FERC's predecessor, the FPC, happily embraced the analogy from which he now makes a hasty retreat. He argued that "[a] restricted construction of Section 27 is supported by the legislative history of that Section which shows that it was derived from Section 8 of the Reclamation Law of 1902." FPC Br. in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), at 39 n.23. Indeed, FERC's predecessor argued in that litigation that "[i]n the case of Section 27 the outstanding fact in its legislative history is its derivation through the public lands bills from Section 8 of the Reclamation Law of 1902." See *First Iowa* Pet. App. 58 (reproducing portion of the FPC brief filed in the court of appeals).

The Solicitor General cannot have it both ways. His loss in *California v. United States* may provide him with a strategic need to abandon his prior position concerning the close relationship of Section 8 to Section 27, but it in no sense deprives that position of its logical force. The relationship of Section 27 to Section 8 cannot be gainsaid.

2. Because, moreover, the meaning of Section 27 is unambiguous, the court of appeals' and FERC's reliance on the alleged "comprehensive" nature of federal regulation of hydropower facilities to support an inference of congressional intent to preempt is misguided. See Pet. App. A7-A9, A35; FERC Br. in Opp. 15-16. Simply put, any such inference is impermissible where, as in this case, Congress has expressly addressed the preemption issue. There is no room for a court to conclude that Congress impliedly preempted state law by enacting federal legislation that "occupied the field" when Congress has included in that legislation a provision such as Section 27 that expressly denies any such intention.

A savings provision such as Section 27, like a provision limiting agency jurisdiction, "provides its own rule of statutory construction." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 376-77 n.5. Thus, this Court has acknowledged that "Congress explicitly may define the extent to which its enactments pre-empt state law" and has indicated that it is only "[i]n the absence of explicit statutory language" that a court may conclude that Congress has "implicitly indicate[d] an intent to occupy a given field to the exclusion of state law." *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145, 1150 (1988). See *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) ("Although Congress intended to dominate the field of pollution regulation, the savings clause negates the inference that Congress 'left no room' for state causes of action."); *California Federal Savings & Loan Ass'n*, 479 U.S. at 282 ("there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two [express] sections provide a 'reliable indicium of congressional intent with respect to state authority'"); *id.* at 295 (Scalia, J., concurring).[14] A finding of implied preemption therefore cannot validly be derived from the alleged "comprehensive" nature of FERC regulation of hydropower facilities pursuant to the Federal Power Act.[15]

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[14] Cf. *Northwest Central Pipeline*, 109 S.Ct. at 1276 ("To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of [Natural Gas Act] § 1(b) that leaves to the States control over production * * *."); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 370 ("We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b) [of the Federal Communications Act]."). See generally L. Tribe, *American Constitutional Law*, § 6-26, at 482 n.8 (2d ed. 1988).

[15] Nor, for this same reason, can FERC properly use the comprehensive nature of its regulatory authority under the Federal

3. The court of appeals' conflict analysis likewise fails to take adequate account of the significance of Section 27. The court of appeals embraced the sweeping notion that Congress intended to preempt any state law that "could" affect the economics of a project or that otherwise might "create a different type of hydropower project from the one described in the license." Pet. App. A12; see *id.* at A11-A13. What the court ignored, however, is that the language and legislative history of Section 27 evince congressional intent to tolerate state laws that seemingly conflict with federal policy.[16]

Section 27 reflects, at bottom, a compromise of competing interests. Prior to the enactment of the Federal Power Act in 1920, federal water power legislation had been stalled for years, largely because of the concerns expressed by representatives of Western States about the impact of such federal legislation on state authority over water. See generally J. Kerwin, *Federal Water-Power Legislation*, 105-263 (1926). Section 27's uneasy fit within a statutory scheme that seemed otherwise to purport to leave no room for continuing state authority did not go unnoticed either by those generally in favor of or opposed to the legislation. For the former, who tended to be less concerned about the impact on state law, the language ultimately included in Section 27 improperly allowed a State to exercise significant regulatory authority over a federally licensed hydropower facility and thus threatened to undo much of the purpose of federal leg-

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Power Act as an excuse for avoiding the plain meaning of Section 27 through the guise of "reconcil[ing] the provisions of Section 27 of the FPA with the comprehensive planning authority vested exclusively in [FERC] by Section 10(a)" (Pet. App. A30).

[16] While conflict analysis for preemption purposes may be warranted, notwithstanding an express nonpreemption provision, that analysis must still be tempered by it, lest that provision be rendered meaningless. See *Northwest Central Pipeline*, 109 S.Ct. at 1276-77 & n.12.

islation.[17] For those more sensitive to the potentially adverse effect of the legislation on state sovereignty, however, the inconsistency between the language ultimately included in Section 27 and the rest of the statute, which would otherwise leave the impression that a federal license trumped state water law, was the very feature of the language that they found the most inviting.[18] At the

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[17] See, *e.g.*, 51 Cong. Rec. 14066-67 (1914) (remarks of Rep. Mann (commenting on language identical to Section 27 contained in predecessor bill)); see note 10 *supra*.

[18] This is evident in several exchanges on the House floor. For instance, Representative Mondell, in commenting on identical language contained in a predecessor bill, remarked that "the amendment [to delete 'other uses'] ought not to be adopted, and yet it is a perfectly logical amendment from the standpoint of the other provisions of the bill * * *." 51 Cong. Rec. 14070 (1914). He further added that "[o]f course [the savings provision] ought to stay. It is one of the few provisions in the bill that ought to be enacted into law." *Ibid.*

Numerous other exchanges leave no doubt that those who favored the savings provision that ultimately became law in Section 27 viewed it as preserving state authority to require a federal licensee to comply with state water law requirements even where different from the conditions of the federal license. An exchange between Representatives Stevens and Raker is one of the more telling:

> Mr. Stevens: Suppose the State of Colorado has laws governing the use of water for the development of power, which laws vary materially from the rules and regulations set out in this act, which would govern, the State law or this law?
>
> Mr. Raker: In answer to the gentleman's question, as I view it, and as we are trying to arrange it, the State law in regard to water rights * * *.
>
> Mr. Stevens: Let me understand. You answer that question, then, by saying that the State law would control?
>
> Mr. Raker: Yes.

51 Cong. Rec. 14070-71 (1914). See 56 Cong. Rec. 9114-15 (1918) (remarks of Rep. Mondell); *id.* at 9810 (remarks of Rep. La Follette); *id.* at 10494, remarks of Sen. Myers); see also 59 Cong. Rec. 6537 (1920) (remarks of Rep. Sinnott).

end of the day it was those who sought the deliberate retention of that conflict within the statutory scheme that prevailed. The language of Section 27 was approved in congressional committee—"after strenuous efforts"—by a vote of 8 to 7 (see 56 Cong. Rec. 9115 (1918) (remarks of Rep. Taylor)), and the resulting compromise struck the balance that broke the legislative deadlock and ultimately secured approval of both chambers of Congress.[19]

For this very reason, FERC's invitation to ignore the plain meaning of Section 27 in order to embrace FERC's (or the court of appeals') vision of a more "workable" federal regulatory scheme must be declined. Congress struck a different compromise by including Section 27, and the courts must honor the legislative judgment. This Court's "task is to apply the text, not to improve upon it" (*Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S.Ct. 456, 460 (1989)).[20]

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[19] Representative Sinnott described well the nature of the compromise (56 Cong. Rec. 9290 (1918)):

> [O]n account of the sharply divergent views persisted in with great tenacity by the respective advocates of Federal and State ownership and control of our water-power resources Congress has no more perplexing legislation to vex it than that embodied in the bill now before the House.
>
> * * * * *
>
> [A]s most legislation is a compromise, this bill is as fair a compromise as can be expected to issue from ingenious and positive minds wedded to pet theories of government, unwilling to stultify long preconceived convictions, but regardful that the needs of the country demand that the deadlock which has for years tied up one of our most valuable resources should be broken.

Because the session ended before the Senate approved the compromise legislation, it was not passed until 1920 when both chambers approved an identical bill. See Pet. Br. 34.

[20] It is no matter that Congress apparently considered, and declined to enact, a proposal that would have required state consent to hydropower projects. See *First Iowa*, 328 U.S. at 179. The language not enacted was not confined, as is Section 27, to preservation of state water law. But, in any event, the central inquiry in statutory construction is the plain meaning of the language actually enacted, rather than speculation concerning the motives that might have prompted the failure of other versions of the bill to become law. Cf. *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1153-54.

It is wholly beside the point whether the compromise embodied in Section 27 best serves the interests of federal hydropower development. Nor is it at all relevant whether that legislative result minimizes duplication of federal and state regulatory efforts. The sacrifice of some valuable interests is the essence of compromise.

Here, those favoring the maintenance of state control of the regulation of water prevailed at the expense of other potentially legitimate interests. The courts are not free in these circumstances, in the guise of statutory interpretation, to strike a different balance. Instead, "[s]trict adherence to the language and structure of the [federal statute] is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises." *Community for Creative Non-Violence v. Reid*, 109 S.Ct at 2177 n.14. For only "[g]iving full effect to the words of the statute preserves the compromise struck by Congress." *Hallstrom v. Tillamook County*, 110 S.Ct. 304, 310 (1989).[21]

Finally, there is no merit to the court of appeals' and respondents' implicit suggestion that the plain meaning of Section 27 should be avoided because toleration of a state "veto" of a federally licensed hydropower facility would produce "absurd or futile results." See *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). There is nothing inherently anomalous about a private entity having to comply with overlapping federal and state regulatory requirements.

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[21] See 53 Cong. Rec. 4204 (1916) (remarks of Sen. Myers) ("I do not care with whom I disagree. I agree with the bill, which says there is no intention to control or interfere with the waters of the States. I am satisfied to agree with the printed terms of the bill in its plain language.").

In this case, for instance, the State of California is not requiring respondent Rock Creek to violate any terms of its federal license. The State is not asserting any right to compel Rock Creek to violate the minimum instream flow requirements contained in its FERC license. To the contrary, the State is, consistently with the federal requirement that a specified "minimum" flow be allowed, requiring Rock Creek to allow a *greater* flow to be maintained. "Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 109 S.Ct. at 1667; see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257-58 (1984).

State regulatory requirements that apply to a federally licensed hydropower project, moreover, do not necessarily preclude a private party from proposing to FERC a project that satisfies both state and federal concerns. As in *California Federal Savings & Loan Ass'n*, "[t]his is not a case where 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where there is an 'inevitable collision between the two schemes of regulation.' *Id.* at 143." 479 U.S. at 290-91. Indeed, there is not even a threshold showing here that compliance with the state standards would render respondent Rock Creek's project economically infeasible over the life of the project. To the contrary, based on a preliminary analysis, FERC found that the project "would be economically feasible over the 50-year term of the license with a levelized net annual benefit of approximately $26,000 if [the State's] recommended flows were adopted." Pet. App. A20.[22]

[22] Nor is the State in any way interfering with a federally required activity. The hydropower facility is not a federal project undertaken by the federal government itself. It is an entirely private endeavor that, based on its compliance with applicable federal requirements, has obtained a federal license from FERC. The legal significance of that federal license, however, is no more than that. It does not convert a private activity into the constitutional equivalent for Supremacy Clause purposes of a federal project. Cf. *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962) (federal license "simply acknowledgment that the activity does not violate federal law, and not an exemption from state licensing or police power requirements.").

In any event, the specter of a state law resulting in further regulation of some aspect of a private activity otherwise in compliance with a federal agency's requirements is anything but the anomaly suggested by the court of appeals and respondents. Such "veto" authority is the inevitable and healthy result in a wide range of contexts where federal and state regulatory authorities happily coexist.[23]

Nor is there any reason to suppose that hydropower projects require special treatment. Certainly, there is no general exemption from state law for hydropower projects. Federal reclamation projects frequently serve significant hydropower purposes and, following this Court's decision in *California v. United States*, such projects must comply with state water law unless inconsistent with clear congressional directives. See 438 U.S. at 672-79.

So, too, it is clear that a FERC licensee is not immune from another agency's regulation, even where the second agency is considering many of the same factors previously considered by FERC in deciding whether to issue

[23] See, *e.g.*, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (rejecting preemption challenge to state requirements applicable to federally licensed blood plasma vendors); *Rice v. Rehner*, 463 U.S. 713 (1983) (upholding state licensing requirements applicable to federally licensed Indian traders on Indian reservations); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (upholding state economic regulation of federally licensed nuclear power facilities); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (rejecting preemption challenge to state licensing requirements applicable to federally licensed marine terminal facilities); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (upholding state regulatory requirements applicable to federally approved agricultural commodities).

a license. For instance, under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, the Army Corps of Engineers may decide, based on its own weighing of many of the same environmental factors already considered by FERC pursuant to the Federal Power Act, that a FERC-approved hydropower project should be barred. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.) (upholding, over FERC's objection, Corps authority to deny Section 404 permit to FERC licensee), cert. denied, 484 U.S. 816 (1987); see also *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (upholding, over FERC's objection, authority of the Secretary of the Interior to impose conditions on FERC licenses issued to projects located within a federal Indian reservation).[24]

Similarly, States already possess pursuant to the Clean Water Act the very type of overlapping regulatory authority with respect to water *quality* standards that FERC here claims Congress must be deemed to have preempted in the Federal Power Act with respect to water *quantity* standards. Not only do state water quality standards supplement federal water quality requirements

[24] Significantly, in a submission to this Court, the Solicitor General, on behalf of both FERC and the Army Corps of Engineers, recently maintained that the resulting overlapping regulatory scheme—which enables the Corps to "veto" FERC-approved projects—did not "present an important issue that warrants this Court's review." Fed. Resp. Br. in Opp. in *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C.), cert. denied, 484 U.S. 816 (1987), at 9. According to the Solicitor General, "[a]s a practical matter, agencies, such as [FERC] and the Corps of Engineers in this case, work out their overlapping programmatic interests through memoranda of understanding that allow each agency a substantial role in the decisionmaking process." *Ibid.* Notwithstanding the federal government's current protests that any overlap in federal and state authority is "unworkable," we believe that actual experience similarly suggests that "as a practical matter," the amount of serious conflict between sovereigns would be minimal. As the State points out, FERC licensees in California have historically sought state water permits and adhered to state regulatory requirements without incident. See Pet. 6-7 n.1.

under the Clean Water Act (see 33 U.S.C. §§ 1311(b)(1)(C), 1370), but Congress specifically required state certification of compliance with applicable requirements (see 33 U.S.C. § 1341) and also authorized the federal agencies responsible for implementation of the Act (EPA and Army Corps of Engineers) to allow administration of the permitting program by state agencies (see 33 U.S.C. §§ 1342(b), 1344(g)). Hence, the Solicitor General's assertion here that the purposes of the Federal Power Act will be hopelessly undermined absent preemption of state water law rings hollow. At the very least, it cannot be said that Congress shares the Solicitor General's apparent antipathy to overlapping state and federal regulatory authority.[25]

C. This Court's Discussion Of Section 27 In *First Iowa* Should Now Be Disavowed.

When all is said and done, respondents' principal support for their proffered construction of Section 27 is this Court's discussion of that provision 44 years ago in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946). For, apart from that decision, there is little in the language of Section 27 itself or the provision's

[25] The Solicitor General's reliance on the provisions of the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. 99-495, 100 Stat. 1243, is misdirected. See FERC Br. in Opp. 20-22. That statute was enacted after the issuance of the FERC license that is the subject of this litigation, but, in any event, the issue here is what Congress intended in enacting Section 27 of the Federal Power Act in 1920. That question does not turn on what a different Congress subsequently intended 66 years later when it amended and added other provisions to federal water power legislation. Moreover, as the State of California explains (Pet. Br. 15 n.8), there is no inconsistency between our view of Section 27 and the provisions of ECPA calling for heightened FERC consideration of the views of other federal and state agencies regarding the impact of a proposed project on instream values. A congressional effort to provide a procedural mechanism to minimize disagreements between federal and state agencies does not evince a "clear and manifest purpose of Congress" to supersede those other authorities when a disagreement persists. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

legislative history to buttress respondents' narrow reading of the Act's nonpreemptive purpose. Certainly the little evidence that might be garnered falls far short of the "clear and manifest purpose of Congress" that this Court has long made clear is required for preemption of a State's exercise of its traditional police power authority. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

We agree with petitioner that the Court's discussion of Section 27 in *First Iowa* was technically dictum.[26] We also agree with petitioner that that case is distinguishable because the state law challenged there, unlike the state law at issue here, sought to accomplish more than mere regulation of the use of water. But, like petitioner, we do not suggest that the significance of *First Iowa* can (or needs to) be discounted on either of those grounds alone. Although the Court's discussion of Section 27 in *First Iowa* was not, strictly speaking, necessary to the result, it was a substantial part of the Court's reasoning in determining the legal issue then before the Court: whether Section 9 of the Federal Power Act required an applicant for a FERC license to present satisfactory evidence of its compliance with state law as a prerequisite to its obtaining a federal license.[27] On re-

[26] The Court's discussion of Section 27 was dictum because it was not necessary to the Court's consideration of Section 9 of the Federal Power Act, the meaning of which was the sole issue squarely before the Court in *First Iowa*. Respondent Rock Creek's claim (Br. in Opp. 8-9) that the discussion must be considered the Court's holding because otherwise the case would be unimportant misapprehends the meaning of a judicial holding. There is no rule that a court's holding must be "important" and thus no corollary principle exists that anything important that a court says in its opinion must be considered part of its holding. Perhaps the most apt characterization of the *First Iowa* Court's discussion of Section 27 was its description by the court of appeals as "extensive commentary" (Pet. App. A10).

[27] See 328 U.S. at 163-64 ("The question at issue is the need, if any, for the presentation of satisfactory evidence of the petitioner's compliance with the terms of Chapter 363 of the Code of Iowa.").

examination, however, the *First Iowa* Court's reading of Section 27 is no longer tenable (if it ever was) and therefore should be disavowed.

The Court's description of Section 27 rested on three basic propositions: (1) the comprehensive nature of the federal licensing scheme (328 U.S. at 164-74); (2) the conflicts between state and federal policy that might result from allowing the application of state water law (*id.* at 167-74); and (3) the Court's understanding of the meaning of Section 8 of the Reclamation Act, which served as the model for Section 27 (328 U.S. at 176-77 & n.20). None withstands scrutiny.

1. The first—the allegedly "comprehensive" nature of the federal permitting scheme—is simply not a legitimate basis for inferring congressional intent to preempt in the face of Section 27's plain terms. As described above (see pages 16-17, *supra*), this Court's decisions have since made clear that reliance on such inferential evidence of intent to preempt is improper where, as in the case of the Federal Power Act, Congress has included a statutory provision (Section 27) that explicitly limits the preemptive scope of the federal Act.

In addition, the Court in *First Iowa* did not have the benefit of full briefing concerning the legislative history of Section 27's enactment and, as a result, misapprehended the congressional purpose in enacting "comprehensive" legislation.[28] As the State shows in this case (see Pet. Br. 31-32), careful examination of the relevant legislative history indicates that Congress sought, at most, to achieve "comprehensive" legislation in the sense of avoiding the fragmented authority at the *federal* level

[28] Contrary to the court of appeals' and FERC's assertion (Pet. App. A12-A13; FERC Br. in Opp. 14-15 n.7), the parties in *First Iowa* did not fully brief the Court concerning the legislative history of Section 27's adoption. In particular, the State of Iowa's submissions in that case contain virtually no references to any of the relevant legislative history, which is ably presented in the State of California's brief in this case.

that had previously hampered hydropower development.[29] The legislative history contradicts the then far more controversial proposition that overlapping state water law authority should also be superseded to promote further hydropower development.

2. The *First Iowa* Court's conflict analysis is similarly deficient. The Court started from the premise that Congress must be presumed to have intended to preempt an overlapping state permit requirement "in the absence of an express provision for it."[30] The Court thus reversed the now-settled presumption against preemption of state law. Indeed, notably absent from the Court's opinion in *First Iowa* is any reference to the need for a "clear and manifest purpose of Congress" to overcome that presumption and thus to preempt state police power authority.

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[29] It is far from clear, however, that the Federal Power Act provides FERC with "comprehensive" authority among federal agencies. See, *e.g.*, *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (Secretary of the Interior may impose conditions on licenses issued to projects located within federal Indian reservation); *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.) (Army Corps of Engineers may deny Clean Water Act Section 404 permit to FERC licensee), cert. denied, 484 U.S. 816 (1987); *Uncompahgre Valley Water Users Ass'n v. FERC*, 785 F.2d 269 (10th Cir.) (Secretary of the Interior (not FERC) possesses exclusive authority to regulate hydropower facilities at a reclamation project), cert. denied, 479 U.S. 829 (1986); see also C. Meyers & A. Dan Tarlock, *Water Resource Management* 489-91 (1971) ("Historian Samuel Hays argues that in fact the 1920 Act was a rejection of comprehensive development."), citing S. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement 1890-1920*, 208-09, 239-40 (1959).

[30] See 328 U.S. at 167 (emphasis added) ("Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress *in the absence of an express provision for it.*").

The *First Iowa* Court also never took into account the significance of Section 27 in its conflict analysis. As a result, the Court improperly substituted its vision of sensible policy—the absence of overlapping federal and state permitting authority—for the quite different compromise struck by Congress in including Section 27 in the Federal Power Act. See pages 18-20, *supra*.

3. Finally, the Court's description of Section 27 in *First Iowa* was based on an understanding of the meaning of Section 8 of the Reclamation Act—which all agree served as the model for Section 27—that this Court has since disavowed. The Court reasoned (and the Solicitor General argued) in *First Iowa* that "[t]he use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under [Section 8 of the] reclamation law and in public land bills, carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language." 328 U.S. at 177 n.20.[31]

As discussed above (see pages 13-15, *supra*), however, this Court in *California v. United States*, has since squarely addresed the meaning of Section 8 and concluded —contrary to its assumption in *First Iowa*—that its meaning is not limited "to proprietary rights," but instead broadly extends to the preservation of state regulatory authority over water rights. See 438 U.S. at 674-75.[32] This Court should now revisit the meaning of Sec-

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[31] The *First Iowa* Court also cited to a lower court decision that had in turn relied on the application of the principle *ejusdem generis* in support of a limited construction of Section 27. See 328 U.S. at 176, citing *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 619 (1922). As discussed above, however, that principle of statutory construction does not apply to the language of Section 27 and, in any event, this Court in *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. at 256, has since rejected that aspect of its narrow reading of Section 27 in *First Iowa*. See pages 11-13 & note 7, *supra*.

[32] The Court in *California v. United States* agreed with the State that state water regulations that were inconsistent with clear con-

tion 27 in light of *California v. United States* and, based on its reasoning, formally acknowledge that Congress likewise intended just what it said in the Federal Power Act: to preserve state regulatory authority "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses * * *."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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gressional directives would, of course, be preempted. See 438 U.S. at 672-79. Respondents' preemption challenge here, however, is based on the allegedly "comprehensive" nature of FERC's licensing authority and not on the equivalent of "specific congressional directives." Notably, in *California v. United States*, the Court rejected a preemption claim that was similarly based on the "comprehensive" nature of the Secretary of the Interior's authority under the Reclamation Act. See 438 U.S. at 677-78.

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No. 89-333

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION and

ROCK CREEK LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN RIVERS, NATIONAL AUDUBON SOCIETY, FRIENDS OF THE EARTH, SIERRA CLUB, AMERICAN WHITEWATER AFFILIATION, FRIENDS OF THE RIVER, ENVIRONMENTAL POLICY INSTITUTE, TROUT UNLIMITED AND SAVE OUR STREAMS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can the Federal Energy Regulatory Commission in licensing a hydroelectric project preempt state water law regulations designed to protect the fish and wildlife resources in the state's rivers?

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No. 89-333

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION and

ROCK CREEK LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN RIVERS, NATIONAL AUDUBON SOCIETY, FRIENDS OF THE EARTH, SIERRA CLUB, AMERICAN WHITEWATER AFFILIATION, FRIENDS OF THE RIVER, ENVIRONMENTAL POLICY INSTITUTE, TROUT UNLIMITED AND SAVE OUR STREAMS IN SUPPORT OF PETITIONER

INTRODUCTION AND STATEMENT OF INTEREST

This case is about who decides how much water must be left flowing in rivers which support hydroelectric projects: the federal government, the states, or the two together? Amici submit that the Federal Power Act mandates that the decision must be made concurrently, with the federal government, in effect, establishing a minimum bypass flow as a "floor" and the states free to establish a higher bypass flow to protect their resources.

Amici[1], non-profit conservation

[1]Amici are American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River, Environmental Policy Institute, Trout Unlimited and Save Our Streams. Pursuant to Supreme Court Rule 37.3, the

organizations with a cumulative membership of over one million persons, have a strong interest in the outcome of this case.[2] Amici believe that hydropower is a useful source of electricity and, especially in light of the serious environmental concerns associated with fossil-fuel and nuclear power generation, nonpolluting hydropower has some distinct environmental advantages. At the same time, certain hydroelectric projects can have serious, and in some instances unacceptable, negative effects on the ecological and recreational value of rivers. Hydroelectric projects can

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consent of the parties to the filing of this amicus curiae brief is filed herewith.

[2]See Appendix for description of Amici.

decimate salmon and other anadromous fisheries by blocking upstream and downstream migration, reduce dissolved oxygen below the acceptable level for fish and other species, or increase water temperatures causing deleterious effects on the ecology of the stream. Impoundments associated with some hydroelectric projects convert free-flowing rivers into slack lagoons, and altered flows below a project can cause deterioration of existing riparian environments. When, as in the case of the Rock Creek project, the water is diverted out of the stream and returned a mile or more downstream, the project virtually eliminates the affected stream segment. Amici believe that the control and mitigation of the these adverse environmental consequences demands

strong and effective governmental regulation.

While hydropower is one of the nation's oldest sources of electric power, the pace of hydropower development has significantly accelerated in the last decade. Today, approximately 2000 non-federal hydroelectric projects are operating under Federal Energy Regulatory Commission ("FERC") licenses. Since the late 1970's, however, FERC has received over 7000 applications to study or construct different hydroelectric facilities. Each year since 1980, FERC has licensed approximately 200 projects nationwide, and between 1984 and 1988 the number of operating hydropower

projects increased by almost 50 percent.[3]

State agencies charged with protecting fish and wildlife and managing river resources closely monitor hydropower development and its environmental effects. As evidenced by the decision of the California Water Resources Control Board on the Rock Creek project, the State of California generally seeks to protect its resources against ill-advised hydroelectric development. In other instances, however, states have not aggressively protected their river resources, and have sometimes sought to impose project operating conditions that

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[3]Federal Energy Regulatory Commission, Hydroelectric Power Resources of the United States (January 1, 1988).

are less protective of the environment than those established by FERC.[4]

Amici support the position of the State of California that it can properly set a higher minimum bypass flow for the Rock Creek hydroelectric project than required by the project license issued by FERC. FERC required minimum flows in the one-mile bypass reach of 11 cubic feet per second (cfs) from May through September and 15 cfs from October

[4] In re Horseshoe Bend Hydroelectric Co., 42 FERC ¶ 61,072 (CCH) (January 25, 1988) (rejecting request of Idaho Department of Water Resources to include in license a condition subordinating license's flow requirements to future upstream consumptive uses); In re Guadalupe-Blanco River Authority, 42 FERC ¶ 61,079 (CCH) (January 28, 1988) (rejecting contention of Texas Water Commission that the FERC could not require minimum flows to protect fisheries in excess of flow specified in state water permit).

through April. California's Water Board has set higher bypass flows to protect fish populations in Rock Creek -- 60 cfs from March through June and 30 cfs from July through February. The Court of Appeals for the Ninth Circuit upheld FERC's assertion that it has exclusive authority to set minimum bypass flows. State of California v. FERC, 877 F.2d 743 (9th Cir. 1989). Amici join California and the forty-three other states acting as amicus curiae in challenging the Court of Appeals' decision.

Amici are filing this brief, however, to emphasize that, just as FERC does not have exclusive jurisdiction to set minimum bypass flows, the states do not have exclusive control over water flows

at hydroelectric projects either. As in many areas of our federalist system, and in the field of environmental regulation in particular, both the states and the federal government play a regulatory role. Amici's position, based on the language of the Federal Power Act (FPA) and the traditional allocation of environmental regulatory authority in our federal system, is that the states and FERC have concurrent jurisdiction over water flow decisions and that operators of hydroelectric facilities must comply with the regulatory requirements set by both FERC and the states. Thus, where a state issues a water permit that calls for a lower water flow than that mandated by FERC license, the licensee is required to comply not only with the state water

permit but also with the more stringent requirements of the FERC license.

SUMMARY OF ARGUMENT

The Federal Power Act (FPA) preserves the traditional regulatory authority of the states over their water resources while granting overall responsibility for the licensing of hydroelectric projects to FERC. The Ninth Circuit Court of Appeals' narrow reading of the FPA would exclude state regulatory authority and must be rejected in light of Section 27's clear and straightforward language, its legislative history and this Court's recent interpretation of virtually identical statutory language in California v.

United States, 438 U.S. 645 (1978). The preservation of state authority over non-federal hydroelectric projects licensed by FERC is even more appropriate in this case than in the context of the federally sponsored reclamation projects addressed in California. While the FPA grants FERC "comprehensive" planning authority, the Court of Appeals was wrong to assume, in the face of the plain language of Section 27, that this grant of planning authority also meant that Congress had given FERC comprehensive and exclusive regulatory authority.

The FPA requires hydroelectric project owners to comply with the provisions of state water law in addition to any requirements imposed by FERC. The

bypass flow requirements established by FERC are merely a minimum; a state may set a higher bypass flow if necessary to protect its river resources. The practical effect of this concurrent regulatory scheme is to require hydroelectric licensees to comply with the minimum bypass flows set by FERC and the minimum bypass flows set by the state water agency. Thus both FERC and the states have the opportunity to achieve their regulatory objectives and there is no conflict between the two sets of regulatory requirements because the project operator can comply with both at the same time.

This system of concurrent jurisdiction is consistent with other federal environmental laws which allow states to

impose more stringent environmental requirements than those imposed by the federal government. In Section 27 of the FPA, Congress included an explicit anti-preemption provision, affirming that it did not intend for FERC decision-making to displace state water authority. At the same time, there is no indication in the FPA that Congress contemplated surrendering all water flow decisions to the states.

ARGUMENT

I. THE FEDERAL POWER ACT PRESERVES STATE REGULATORY AUTHORITY OVER BYPASS FLOWS AT FERC-LICENSED HYDROELECTRIC PROJECTS

The Federal Power Act provides, in affirmative and explicit language, that a FERC licensee, in addition to complying with the terms of its FERC license, must comply with the requirements of state water law. Section 27 of the Federal Power Act states:

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for

> municipal or other uses, or any vested right acquired therein. 16 U.S.C. § 821.

This "anti-preemption" provision, see California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 107 S.Ct. 683, 697 (1987) (Scalia, concurring), encompasses state regulation of water uses, as well as rights acquired under state water law; the statute states that the Federal Power Act does not interfere with "the laws of the respective States relating to the control, appropriation, use, or distribution of water..., or any vested right acquired therein" (emphasis added). Section 27 preserves a wide range of state water regulations because the statute speaks of state laws relating to the "control, appropriation, use, or distribution of water." Section 27 also encompasses an unlimited range

of water uses, including hydropower, because the statute refers to state regulation of water "used in irrigation or for municipal or other uses." (emphasis added).

The most obvious way to construe the Federal Power Act so as not to "affect" or "interfere" with state water law is to conclude that state water law requirements apply to nonfederal hydroelectric projects. Stated differently, state law is not affected or interfered with as long as it is recognized that a FERC licensee must comply with state law. The plain mandate of Section 27 is fulfilled by requiring the sponsor of the Rock Creek

project to comply with the conditions of its state water permit.[5]

As explained in detail in the Brief of the State of California at Section III, pp. 22-35, the legislative history of the Federal Power Act confirms that Congress did not intend to displace state law. For example, as stated by

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[5]This interpretation is supported by scholarly opinion. Whittaker, Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers, 10 Harv. Envtl. L. Rev. 135 (1986); Cumulative Impacts of Hydroelectric Development, 11 Harv. Envtl. L. Rev. 77 (1987); Small Hydroelectric Projects and State Water Rights, 18 Pac. L.J. 1225 (1987); Arnold, Emerging Possibilities for State Control of Hydroelectric Development, 13 Envtl. L. Rep. 10135 (May 1983); Thomas, Leacox and Farman, Federal Incentives for Hydroelectric Power Projects at New Dams: FERC's Concerns, 18 U.C. Davis L. Rev. 287 (1984); Comment, Hydroelectric Power, the Federal Power Act and State Water Laws: Is Federal Preemption Water-Over-The-Dam? 17 U.C. Davis L. Rev. 1179 (1984).

Congressman Ferris in 1914 in introducing H.R. 16673: "Section 14 [now section 27] is a section disclaiming any intention on the part of the Federal Government to interfere with vested rights or the State laws with reference to water rights or the appropriate distribution of water used for irrigation or municipal purposes." 51 Cong. Rec. 13625 (1914) (statement of Rep. Ferris). At this as well as many other points during the deliberations on the Act, Congress made plain its intention to preserve state regulatory authority over water.

In addition, the legislators clearly and repeatedly stated that the Federal Water Power Act was intended to be consistent with the tradition of federal

deference to state water laws followed in the Federal Mining Act of 1988 and Reclamation Act of 1908. See, e.g., 53 Cong. Rec. 740 (1916) (statement of Rep. Taylor).

In reaching the conclusion that the Water Board's minimum flow requirements were preempted, the Court of Appeals principally relied on the Court's decision in First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946). In First Iowa, the Court overturned a decision by the Federal Power Commission (predecessor to FERC) denying a license for a hydroelectric project on the ground that the developer had not received a use permit under Iowa law. The only issue squarely presented in First Iowa was

whether the Commission had properly rejected the license application under section 9(b) of the FPA, which requires hydroelectric developers to present "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." 16 U.S.C. § 802. The Court held that section 9(b) only requires a showing of an effort to comply with that law, not actual compliance, and

therefore the Commission had improperly denied the license.[6] The First Iowa Court also commented in dictum that section 27 does not preempt state laws "relating to property rights as to the use of water" and that it "has primary, if not exclusive reference to such proprietary rights." 328 U.S. at 175-76. In ruling that the State of California lacked authority to require higher minimum bypass flows than those required in the FERC license, the Court of Appeals adopted the view that Section 27 was applicable only to "proprietary rights." 877 F.2d at 749.

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[6]The holding of the First Iowa Court on the proper interpretation of Section 9(b) has not been challenged in this case. Amici note that if the Court rejects the expansive federal preemption analysis followed in First Iowa, it may be appropriate to revisit the proper interpretation of Section 9(b).

In California v. United States, 438 U.S. 645 (1978), the Court effectively rejected the conclusions and reasoning of First Iowa. The Court held in California that section 8 of the Reclamation Act generally requires federal agencies when constructing and operating federal reclamation projects to comply with terms and conditions attached to state water permits. Section 8 provides, in language essentially identical to that of section 27 of the FPA, that federal reclamation projects are subject to state laws relating to "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 43 U.S.C. §§ 372, 373.

Significantly, the First Iowa Court expressly noted that section 27 was modeled after the language of section 8 and should be interpreted in the same fashion. 328 U.S. at 176 n.20.

Not only did this Court in California reach an entirely different conclusion than the First Iowa Court about the meaning of the statutory language, the California Court expressly rejected the proprietary rights theory that was the premise for the dictum in First Iowa that section 27 was not intended to preserve state regulatory authority over hydroelectric projects. 438 U.S. at 674-75. Further, this Court in California specifically disavowed two decisions that expressly relied on the proprietary rights theory that Section

27 is limited to "takings" of water rights -- Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 291-92 (1958) and City of Fresno v. California, 372 U.S. 627, 629-30 (1963). 438 U.S. at 674-675. The rejection of the proprietary rights theory in California thus effectively overrules the dictum of the Court in First Iowa.

The Court of Appeals offered several unconvincing reasons for its refusal to follow this Court's teachings in California. First, it erroneously suggested that this Court's interpretation of section 8 in California did not effectively overrule this Court's interpretation of section 27 in First Iowa because the two sections "address two different and

entirely separate water use systems." 877 F.2d at 749. This statement is incorrect because both the FPA and the Reclamation Act address federal programs governing water development projects. Bureau of Reclamation projects have the same, if not greater, potential for interfering with the objectives of state water regulatory laws as do non-federal hydropower projects licensed by FERC. No difference between the Bureau of Reclamation's water development program and FERC's licensing program justifies a different interpretation of the same statutory language applicable to each agency. Indeed, if anything, a stronger case can be made for federal preemption of state water laws applicable to Bureau projects built and operated by the federal government than non-federal

hydropower projects which are subject only to federal licensing.

The second defect in the Court of Appeals' decision is its reliance on the "comprehensive hydropower planning authority" vested in FERC as support for the conclusion that the FPA preempts inconsistent state regulation. 877 F.2d at 748. Amici do not dispute that Congress has directed FERC to ensure that its licensing decisions with respect to individual projects are consistent with comprehensive, basin-wide plans designed to achieve an appropriate balance between competing public uses of rivers. See LaFlamme v. FERC, 842 F.2d 1063 (9th Cir. 1988); National Wildlife Federation v. FERC, 801 F.2d 1505 (9th Cir. 1986). It

hardly follows, however, from this grant of comprehensive planning responsibility that Congress intended to vest exclusive regulatory authority over hydroelectric projects in FERC alone. It is not at all contradictory for Congress to direct FERC to take the lead in preparing plans for hydropower development and at the same time preserve a sphere for state regulation of hydroelectric projects.

This Court, in Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), already has rejected the contention that Congress' grant of comprehensive planning responsibility must mean that Congress intended to grant FERC exclusive regulatory jurisdiction as well. The Escondido decision dealt with section

4(e) of the FPA, which provides that FERC may issue a license on certain federal lands only after it determines that the project "will not interfere or be inconsistent with the purpose for which such [federal] reservation was created or acquired." 16 U.S.C. § 797(e). Section 4(e) also provides that "[the license] shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls [Interior or Agriculture] shall deem necessary for adequate protection and utilization of such reservation." Id. The Court rejected FERC's contention that it had the authority to review project conditions developed by the Departments of Interior or Agriculture and held, based on the plain language of

section 4(e), that FERC must include the Departments' conditions in the license without modification. 466 U.S. at 795.

The petitioners in Escondido explicitly argued, in line with the thinking of the court below, that the Departments' authority to require inclusion of conditions in a FERC license would be inconsistent with FERC's responsibility under section 10(a) to determine that "the project adopted ... will be best adapted to a comprehensive plan." 466 U.S. at 778 n.21. The Court rejected this argument as plainly inconsistent with the scheme of the FPA. Id. For the same reason, the Court in this case should reject the conclusion of the Court of Appeals below that FERC's comprehensive planning

responsibilities preclude the application of mandatory state water law requirements to hydroelectric projects.

Congress also has provided for other federal and state resource agencies to play important roles in regulating hydroelectric development, further undermining the notion that FERC's comprehensive planning responsibility requires that FERC also have exclusive regulatory authority. Under section 404 of the Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344(a), the United States Army Corps of Engineers is authorized to issue permits for the discharge of dredged or fill material to navigable waters at a specific disposal site. Because the construction of a dam or hydroelectric

facility typically involves the use of dredged or fill material, the Corps generally has concurrent jurisdiction with FERC over this aspect of hydroelectric licensing. See Monongahela v. Marsh, 809 F.2d 41, 51 (D.C. Cir. 1987) (rejecting contention that FERC has exclusive jurisdiction over hydroelectric development).

Similarly, under section 401 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1341, a FERC licensee is required to obtain water quality certification from state officials before constructing a hydroelectric project. In Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982), the court affirmed the breadth of state control

over projects requiring federal licensing and emphasized that a state certification can include such limitations as are necessary to assure compliance "with any appropriate requirement of state law." 684 F.2d at 1056. Under the holding in Roosevelt Campobello, if a state legislature or state agency prohibits or sets conditions on a proposed hydroelectric project, and if the state's water quality agency includes those requirements in its section 401 water quality certification, those conditions are binding on FERC and must become part of the FERC license.

Finally, it is telling that, in recent amendments to the FPA, Congress specifically provided for independent

planning by other federal and state agencies to complement FERC's own comprehensive planning activities. Section 10(a) of the FPA, as amended by the Electric Consumers Protection Act of 1986, requires FERC to consider "[t]he extent to which [a proposed] project is consistent with a comprehensive plan ... for improving, developing or conserving a waterway or waterways affected by the project that is prepared by -- (i) an agency established pursuant to Federal law that has authority to prepare such a plan; or (ii) the State in which the facility is or will be located." 16 U.S.C § 803(a)(2)(A) (emphasis added). Congress enacted this new provision in reaction to FERC's traditional refusal to consider state river development and conservation plans in making its

licensing decisions. Since Congress has now explicitly recognized state and federal agency comprehensive planning efforts it is absurd to try to equate FERC's comprehensive planning mandate with a grant of exclusive regulatory jurisdiction.[7]

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[7]While this case arises from the State of California, and is likely to have particular significance for other western states that have similar appropriative water rights laws, it is important to emphasize that the Court's decision will not be limited in its impact to those states. The language of Section 27 refers in broad terms to state laws "relating to the control, appropriation, use or distribution of water;" there is no limitation in the language of the provision as to the type of state water law. Furthermore, while the legislative history reveals a special concern about the overlap between FERC and state jurisdiction in the western United States, there is no hint in the legislative history that any of the states were intended to be excluded. As a result, Section 27 preserves state water regulatory authority in a variety of forms. While nine states follow the so-called appropriative water rights doctrine

II. FERC AND THE STATES SHARE CONCURRENT JURISDICTION OVER BYPASS FLOWS

The most appropriate resolution of the conflicting demands of the states and FERC on water resources is to recognize that the FPA establishes concurrent jurisdiction over bypass flows at hydroelectric projects licensed by FERC. This is not only the proper reading of Section 27 in the context of the language and legislative history of the FPA but also is consistent with the

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adopted in California, 29 states have a riparian water law system and 12 states have hybrid systems. See Getches, Water Law 3-7 (1984). Section 27 encompasses all of these approaches to water regulation.

traditional balance of state and federal control over environmental resources.

While the State of California in this case mandated higher bypass flows than those required by FERC, it is important to recognize that in other cases FERC may decide to mandate higher flows than the states. For example, in In re Guadalupe-Blanco River Authority, 42 FERC ¶ 61,079 (CCH) (January 28, 1988), which involved the construction of the Canyon Dam Hydro Project on the Guadalupe River in Texas, FERC rejected the State of Texas' challenge to FERC's authority to set higher flows than those provided by the state water permit for the project. The FERC license required a continuous minimum flow of 90 cfs during project operation. Id. By

contrast, the state water permit prescribed water releases equal to the natural inflow to the reservoir. Id.

Strictly speaking, of course, this case does not present the issue of FERC's authority to require one of its licensees to provide minimum flows higher than those required by the state. Nonetheless, this Court's decision will necessarily shed important light on this issue. While the forty-three states supporting the position of the Petitioner State of California have not directly addressed this issue, it is clear from their brief in support of California's petition for a writ certiorari that they believe the FPA should be construed to grant the states "exclusive control" over state waters,

and to support "[a] single comprehensive regulatory scheme" governed by the states. Brief of Amici Curiae States of Idaho, et al. in Support of Petitioner at 15, 17. Amici conservation groups disagree with this reading of the FPA. Section 27 is, at most, an "anti-preemption" provision, not a complete surrender of federal authority over water flows.

Section 27 states that the FPA should not be construed "as affecting or intending to affect or in any way to interfere" with state water laws. 16 U.S.C. § 821. Nothing in the language of section 27 suggests that it was intended to grant either the federal government or the states exclusive jurisdiction to establish water flows at

hydroelectric projects. Section 27 does not remove federal authority, it merely preserves state authority. The FPA does not "affect" or "interfere" with state water law as required by Section 27 so long as it is understood that a FERC licensee is subject to concurrent state and federal jurisdiction and must comply with the water flow requirements of FERC and the state.

The conclusion that the FPA allows FERC to establish a minimum bypass flow as a "floor" while leaving the states free to set a higher bypass flow is consistent with recent decisions of this Court dealing with federal preemption. For example, in California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 107 S.Ct. 683 (1987), the Court upheld

against a preemption challenge a California statute that required employers to provide unpaid leave for pregnant workers. The Court ruled that the federal Pregnancy Discrimination Act (PDA), which requires that pregnant women be treated the same as other disabled but nonpregnant employees, did not prevent the state from providing greater protection for pregnant workers. Id. The Court expressly adopted the Court of Appeals' conclusion that Congress intended the federal PDA to be "'a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise.'" California Fed. Savings & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985). In reaching the conclusion that the PDA's requirements were a floor

for worker benefits, not a ceiling, the Court relied on the two anti-preemption clauses contained in Title VII, of which the PDA was a part, which "severely limit Title VII's pre-emptive effect", 107 S.Ct. at 690, and the legislative history of the PDA indicating that "Congress repeatedly acknowledged the existence of state anti-discrimination laws that prohibit sex discrimination on the basis of pregnancy." The Guerra Court pointed out that employers could comply with both federal and state law and that "[t]his is not a case where "'compliance with both federal and state regulations is a physical impossibility.'" 107 S.Ct. at 695, quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

Section 27 is an "anti-preemption" clause of the type that was at issue in Guerra. 107 S.Ct. at 697 (Scalia, J., concurring). The legislative history of the FPA evinces no intent on the part of Congress to supercede state water law. In fact, the legislative history contains numerous comments on the need for the protection of state authority. Thus, as with the Pregnancy Discrimination Act at issue in Guerra, Congress recognized in the FPA that states have legislated and would continue to legislate in this area.[8] And, as in Guerra, it is not a physical impossibility for the operator of the

[8]Sixteen of the nineteen western states have incorporated instream flow protection into their prior appropriation systems. Meyer, Western Water and Wildlife: The New Frontier (1989).

Rock Creek project to comply with both federal and state law.

The notion that federal law provides a floor for resource protection to which states may add higher ceilings appears throughout federal environmental legislation. Under the Clean Air Act, for example, a state may enforce stricter air pollution emission requirements than those required nationwide by the Environmental Protection Agency. 42 U.S.C. § 7416. Similarly, under the Resource Conservation and Recovery Act, a state may set more stringent requirements for solid waste disposal than the federal government. 42 U.S.C. § 6929; see also 33 U.S.C. § 1370 (Clean Water Act).

The conclusion that section 27 preserves concurrent FERC authority over water flows is also supported by a common sense understanding of what is involved in regulating the environmental effects of hydroelectric development. FERC simply cannot carry out its responsibility to prevent and/or mitigate the adverse effects of hydroelectric development on rivers unless it has the authority to mandate specific water flows. In Federal Power Comm'n v. Udall, 387 U.S. 428 (1967), the Court recognized that FERC's duty to examine whether a proposed project will serve the public interest requires "an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in

preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife." 387 U.S. at 450. The resolution of "all issues relevant to the public interest," Id., including instream recreation and fisheries, obviously requires consideration of minimum flows at hydroelectric projects.

The Electric Consumer Protection Act of 1986 (ECPA), Pub.L.No. 99-495, 100 Stat. 1243 (1986), further reinforces FERC's duty to consider instream flows as one aspect of its regulatory responsibilities. For example, section 10(j) of the FPA, as amended by ECPA, directs FERC to include

in project licenses terms and conditions to protect fish and wildlife. 16 U.S.C. 803(j). In practice, the single most common and significant condition developed pursuant to section 10(j) is a minimum flow requirement. Furthermore, section 4(e) of the FPA, as amended by ECPA, directs FERC in deciding whether and on what terms to license a project, to give "equal consideration" to, on the one hand, power generation and, on the other, to "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. 797(e). FERC's "equal consideration"

mandate would be eviscerated if FERC could not provide protection for downstream fisheries and recreation by setting appropriate minimum flow requirements.

It would literally be impossible for FERC to regulate the construction and operation of hydroelectric facilities, on the one hand, and for the states to regulate the appropriation and use of water, on the other. The issue of the appropriate quantity of stream flow at a hydroelectric project is critical in the hydroelectric licensing process as well as in the state regulatory process. The unavoidable practical overlap between water regulation and hydroelectric licensing requires some overlap as well in the authority

exercised by FERC and by the state over hydroelectric projects.

The conclusion that FERC and the states exercise concurrent jurisdiction over minimum flows avoids unnecessary conflict between state and federal requirements. In this particular case, for example, FERC required a minimum by-pass flow of 11 and 15 cfs depending on the season, and the California Water Board required a minimum by-pass flow of 30 and 60 cfs. While the minimum flow required by the Water Board is higher than the minimum flow required by FERC, there is no actual conflict because the licensee will comply with both requirements if the licensee meets the state standard. Similarly, if FERC were to set a higher flow requirement than

the state, the licensee could comply with both by meeting the FERC standard.

Finally, concurrent federal and state jurisdiction over water flows at hydroelectric developments is consistent with this Court's recent decision in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), concerning the appropriate regulatory balance between state and federal control over natural resources. In Granite Rock this Court approved the state and federal government's shared regulatory authority over federal mineral resources by upholding a permit requirement imposed by the California Coastal Commission on a mining developer operating on federal land. Although the project was located on lands

administered by the United States Forest Service, this Court required the mining developer to obtain an additional permit from the state agency. In reaching its decision, this Court reversed the Ninth Circuit Court of Appeals which had relied on the so-called "First Iowa doctrine" in reaching the conclusion that the Coastal Commission's permit authority intruded on federal authority. Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077, 1082-83 (9th Cir. 1985).

The decision of the court below in the case at bar directly conflicts with Granite Rock's teaching that federal agencies must accommodate state environmental regulatory authority. Moreover, under the Granite Rock

decision, FERC's assertion of exclusive jurisdiction amounts to an argument that there is no possible set of conditions that the California State Water Resources Control Board could place on the hydroelectric license that would not conflict with federal law, i.e., a facial challenge to the State Water Board's minimum flow requirement. Granite Rock soundly rejected that approach.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below and remand the case for further

proceedings not inconsistent with its opinion.

DATED: January 16, 1990

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APPENDIX

DESCRIPTION OF AMICI CURIAE

American Rivers is a non-profit organization with offices located at 801 Pennsylvania Avenue, S.E., Washington, D.C. The mission of American Rivers is to preserve America's outstanding rivers and their landscapes. With approximately 12,000 members across the country, American Rivers is the nation's principal river conservation organization.

National Audubon Society is one of the oldest, largest, and most experienced national conservation organizations. It has approximately 500,000 members, including approximately 65,000 members in the State of California, who are dedicated to the conservation and wise

use of natural resources and protection of the environment. National Audubon Society is incorporated under the laws of the State of New York and has its corporate headquarters at 950 Third Avenue, New York, New York 10022. High among National Audubon Society's purposes is the conservation of the nation's waters and the protection of riparian and aquatic habitat.

Friends of the Earth is a national and international conservation organization, incorporated in the State of New York, with approximately 15,000 members residing in the fifty United States and the affiliate conservation organizations in thirty-one different countries around the world. Its office is located at 218 D Street, S.E., Washington, D.C. 20003.

Friends of the Earth has a long history of seeking to preserve special free-flowing rivers and streams and promoting ecologically sound hydroelectric development. Its members use and enjoy many of the rivers and streams that are threatened by hydroelectric development.

The Sierra Club is a non-profit corporation organized in 1892 under the laws of the State of California, with its principal place of business in San Francisco, California and other offices located throughout the nation. Its office is located at 730 Polk Street, San Francisco, California 94109. The Sierra Club is a national conservation organization with approximately 420,000 members dedicated to protecting natural resources, including outstanding

riverine resources. Approximately 160,000 of the Club's members reside in the State of California.

American Whitewater Affiliation was established in 1961 to protect and enhance the recreational enjoyment of whitewater sports in America. Its office is located at P.O. Box 375, Denver, North Carolina 28037. The primary focus of the Affiliation's activities has been the preservation, protection and enjoyment of whitewater rivers in America and throughout the world. The Affiliation is a Missouri not-for-profit corporation with approximately 1300 individual or business members and 61 affiliate members.

Friends of the River is a California non-profit organization with 9,000 members. Its office is located at 909 12th Street, Suite 207, Sacramento, California 95814. Its mission is to preserve streams and rivers in their natural state in the western United States. Most of its members use rivers and streams for fishing, boating, walking, aesthetic appreciation and other forms of recreation. Friends of the River is frequently involved in proceedings before the Federal Energy Regulatory Commission and the State of California Water Resources Control Board.

Environmental Policy Institute is a national conservation organization dedicated to the protection of the

environment and the conservation of natural resources. Its office is located at 218 D Street, S.E., Washington, D.C. 20003. It is vitally interested in assuring the maximum protection for America's most outstanding rivers. Environmental Policy Institute has a long-standing interest in promoting sound water development policy, and has assisted state as well as local organizations in river protection efforts.

Trout Unlimited is a national non-profit conservation organization with approximately 64,000 members dedicated to the preservation, enhancement and restoration of the coldwater fisheries of America. It engages in a variety of activities including assisting local,

state and federal agencies in fisheries management. Its offices are located at 501 Church Street, N.E., Vienna, Virginia 22180. A key to maintaining coldwater fisheries' biological integrity is the quantity and quality of the water. Thus, Trout Unlimited works to assure stream flows that support strong trout and salmon populations.

Save Our Streams (SOS) is a grassroots volunteer organization devoted to preservation of free-flowing streams on federal lands in California. Its office is located at P.O. Box 56, North Fork, California 93643. SOS has 750 members who use California streams for hiking, swimming, fishing, and spiritual renewal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-333

STATE OF CALIFORNIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CITY OF KLAMATH FALLS, OREGON AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The City of Klamath Falls, Oregon is a municipal corporation that has applied to the Federal Energy Regulatory Commission (FERC or the Commission) under part I of the Federal Power Act (FPA) for a license to construct and operate a hydroelectric project, known as the Salt Caves project, on the Klamath River. Some of the fast lands included in the project are owned by the United States and some by private parties. The State of Oregon contends that the reach

of the river involved is navigable and, therefore, that the State owns the bed, but this has not been authoritatively determined.

No one questions that the project is required to be licensed by FERC under the FPA, but four agencies of the State of Oregon, not including the Environmental Quality Commission from which a certificate of compliance must be obtained under § 401 of the Clean Water Act (33 U.S.C. § 1341), assert that the project may not be constructed unless, in addition to a license from FERC and a certificate from the Oregon Environmental Quality Commission, the City also obtains various permits from each of them.

The Oregon Water Resources Commission contends that the City must obtain a permit to divert water from it and that it is authorized to impose conditions unrelated to the protection of the water rights of other persons. The Energy Facilities Siting Council asserts that the City must obtain a license from it to construct the physical facilities of the project. Based on its contention that the reach of the Klamath River within the boundaries of the project is navigable and that Oregon owns the bed, the State Land Board asserts that the City must obtain a lease or right-of-way from it. The Department of State Lands asserts that the City must obtain a permit from it before doing anything that may affect or disturb the bed.

By either declining to grant or making known that it has no intention of granting the permit it contends the City must obtain to construct the project, each of these agencies has demonstrated that the project will not be constructed if its position respecting the scope of its authority is sustained, regardless that

FERC issues a license upon concluding, after plenary consideration, that the project is the

> best adapted to a comprehensive plan for improving or developing [the] waterway . . . for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water—power development, for the adequate protection, mitigation, and enhancement of fish and wildlife . . . and for other beneficial public users, including irrigation, flood control, water supply, and recreational and other purposes . . . .

§ 10(a) FPA, as amended (16 U.S.C. § 803(a)).

SUMMARY OF ARGUMENT

California's case is rested on several false premises, among them (1) that, under the equal footing doctrine, a new state receives the same rights in jurisdictional waters of the United States as it receives in the beds and banks of navigable waterways; (2) that, by the Mining and Desert Land Acts of the last century, the United States surrendered some part of its ultimate dominion over waters of the United States subject to the control of Congress under the commerce and property provisions of the Constitution; and (3) that § 27 of the FPA is an "anti-preemption" provision.

Each of these postulates is dead wrong and their erroneousness infects the whole of California's case.

The provision of § 8 of the Reclamation Act of 1902 that requires the Secretary of the Interior, in carrying out that Act, to proceed in conformity with state water law, has no counterpart in § 27 of the FPA. This provision was determinative of *California v.*

United States and, in its absence, § 8 undoubtedly would have been construed in *California* as was § 27 in *First Iowa*. There is no tension, let alone conflict, between the two decisions.

The legislative history of the FPA was thoroughly considered in *First Iowa* and California has presented nothing to warrant its review. It is noteworthy that much of the "history" brought forth by California relates to bills that proposed only to authorize the leasing of the public lands for the development of water power. These bills did not entail, as the FPA does, an exercise of the commerce powers over all jurisdictional waters of the United States.

The Court's construction of § 27 of the FPA in *First Iowa* is not dictum. It is the heart of the case. California's contentions (1) that confirming the principle that, as to matters assigned to the Commission's jurisdiction by the FPA, the Commission's authority is exclusive of any "concurrent" state authority, will complicate the administration of water resources, and (2) that the by-pass flows the state agency attempted to mandate in this case, being greater than those set by the Commission, would not be inconsistent with the Commission's prescription, are specious.

Rarely are jurisdictional waters of the United States subject to regulation under a unitary state regime. Typically, they are subject to a complex of state, federal and, sometimes, international regulation and, in any event, the exercise by the Commission of the exclusive jurisdiction defined by the Court in *First Iowa* has caused no particular problems in the administration of the nation's waters for almost fifty years.

The feasibility of a hydroelectric project depends on the quantity of flows through its powerhouse and California's attempt in this case to require greater by-pass flows than provisionally found adequate by the Commission is clearly incompatible with the conditions of the license for the project issued by the Commission.

Fully cognizant of how § 27 of the FPA was construed in *First Iowa* and applied for almost half a century, Congress recently confirmed, in adopting the Electric Consumers Protection Act, that the Commission is to continue as the final arbiter of whether a project should be authorized and, if so, on what terms and conditions.

ARGUMENT

I. California's Argument Is Based on Fallacious Premises

California sets forth several fallacious propositions that serve as premises for its argument. Among these are (A) that the equal footing doctrine operates to transfer ownership or control of waters to new states in like manner as to transfer ownership of the beds and banks of navigable streams, Cal. Op. Br. 5-6, 18-19; (B) that the effect of the triptych of 19th Century statutes consisting of (1) § 9 of the Mining Act of 1866 (30 U.S.C. § 51), (2) § 17 of the Act of July 9, 1870 (30 U.S.C. § 52), and (3) the Desert Land Act of 1877 (43 U.S.C. §§ 321-23, 325, 327-29) was to extinguish federal powers over waters, *id.* at 20-21; and (C) that § 27 of the FPA (16 U.S.C. § 821) is an "anti-preemption" provision, *id.* at 8-12.

A.

Although it is held, under the equal footing doctrine, that the United States holds the beds of na-

vigable waters in trust for future states and that, upon admission of a new state to the Union, it receives title to such beds by operation of the doctrine, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845), (to the extent the United States has not previously disposed of such beds or reserved them for its own use, *United States v. Holt State Bank*, 270 U.S. 49, 55 (1925)), it has never been held that, simply by operation of the doctrine, a new state receives title to or power to dispose of waters of the United States, any more than it receives title to or power to dispose of the public lands of the United States.

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor to the Federal government by the Constitution.

Gibson v. United States, 166 U.S. 269, 271-72 (1897). *See also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 424 (1940) (United States has dominion over the water power in navigable streams and there can be no private ownership of such water); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1912) (private ownership of running water in a navigable stream is inconceivable).

B.

As a constitutional matter, there can be no question that, under its power "to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States" (Art. IV, § 3, cl. 2), Congress could have made radically different provisions for the disposition and use of water on the public domain than it did by the 19th Century statutes cited above. It could, for example, have attached such water to the riparian uplands and provided that rights of use would pass with the lands. *Cf. proviso* § 8 of the Reclamation Act of 1902 (43 U.S.C. § 372).

By these statutes, Congress severed the waters from the lands of the public domain and delegated to the western territories, as well as to the western states, the authority to provide for the acquisition and regulation of private rights in non-navigable waters. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706 (1899); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162 (1935). Congress, however, did not thereby surrender or extinguish the ultimate dominion of the United States or abrogate any of its own constitutional powers. *Rio Grande, supra.*

Retention by Congress of ultimate authority over waters of the United States is demonstrated by the reserved rights doctrine, *Arizona v. California*, 373 U.S. 546, 600 (1963); *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976), and the power of Congress to override state laws in commissioning federal projects entailing the use of water, *California v. United States*, 438 U.S. 645, 674 (1978). The only limitation on Congress is that, except in the exercise of the commerce powers, it cannot expropriate water rights vested under state law without subjecting the United States to an obligation under the fifth amendment to pay just compensation.

Again, as a constitutional matter, there can be no question that Congress would have the power, saving vested property rights, to repeal all of the 19th Century and other acts delegating authority to the states to provide for the acquisition and regulation of private water rights. Whatever might be said about the wisdom and practicality of such a repeal, it would be within the constitutional powers of Congress, in aid of legislation to formulate a national policy for the use of all water resources remaining available, to provide for the reservation to the United States of all unappropriated waters in streams subject to the jurisdiction of Congress under the commerce clause and of all waters on lands subject to the jurisdiction of Congress under the property clause.

Whatever "deference" the United States accords the states in the management of our national waters is, as the decisions of this Court have made clear, by grace of congressional policy, not by imperative of the Constitution.

C.

Section 27 of the FPA is not, as California would have it, an "anti-preemption" provision. It is, as the Court stated in *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152, 175 (1946), a "saving" provision. It was included to preclude construction of the Act as wholly displacing state water law in relation to waters subject to the control of Congress under the commerce and property powers or as authorizing the expropriation without compensation of private water rights.

Adoption of the FPA (originally the Federal Waterpower Act) was an exercise by Congress of its

property and commerce powers, an adjunct of the latter of which is the dominant servitude for navigation the United States possesses in relation to the waters of the nation that are subject to the control of Congress under the commerce powers. All private water rights are subordinate to this servitude and may be extinguished by Congress incident to the exercise of its commerce powers without subjecting the United States to any obligation to compensate their former owners. Although the servitude is commonly associated with navigation, it is as broad as the commerce powers and pertains to any exercise by Congress of such powers for any purpose within them, including the development of water power. *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 426-27.

In the absence of § 27, the Act, as an exercise of the commerce and property powers, would undoubtedly have been construed as dedicating the jurisdictional waters of the United States ("streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, or upon any part of the public lands and reservations of the United States," § 4(e), FPA, [16 U.S.C. § 797(e)]) to its purposes and as removing them entirely from the future operation of state law. And, in view of the servitude, it would have been construed as authorizing the invasion or extinguishment without compensation of any private rights in waters required by projects licensed by the Commission. Indeed, even with § 27, it was not determined until 1954 by the Court's decision in *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 293, that the Act was not intended to have this effect.

Thus, California's argument is based on the fallacious premise that § 27 is an "anti-preemption" provision. In fact, as this Court said in *First Iowa*, it is a "saving" provision. It was included not to limit the jurisdiction of the Commission but to preclude construction of the Act itself (a) as completely displacing the further application of state water law to jurisdictional waters of the United States, even where a particular exercise of the Commission's authority was not involved, or (b) as authorizing licensees of the Commission to invade private water rights without making compensation.

Contrary to California's suggestion that, unless § 27 is construed as an anti-preemption provision, the first part of the section is a nullity, Cal. Op. Br. 10, such part is essential to preserve the application of state water laws to jurisdictional waters of the United States, where such application does not conflict with the exclusive authority granted the Commission to license hydroelectric projects on such waters. In the absence of the first part of § 27, the Act would have ruled state water laws completely off jurisdictional waters of the United States.

II. There Is No Counterpart in § 27 of the FPA of the Provision of § 8 of the Reclamation Act Applying To the Secretary of the Interior That Was Determinative of *California* v. *United States*, and There Is No Tension between *California* and *First Iowa*

While it is true that the language contained in § 27 of the FPA was largely borrowed from § 8 of the Reclamation Act of 1902, § 8 contains several provisions that have no counterpart in § 27. In its entirety, § 27 consists of language similar to that

contained in the first clause of § 8. But after this clause (where § 27 ends), § 8 goes on—

> and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

43 U.S.C. §§ 372, 383.

Of critical importance is that the provision in § 8 relating to the Secretary of the Interior, which has no counterpart in § 27, was determinative of *California v. United States*, 438 U.S. 645 (1978).

> From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. *First, and of controlling importance to this case, the Secretary would have to appropriate, purchase or condemn necessary water rights in strict conformity with state law.*
>
> * * *

Second, once the waters were released from the Dam, their distribution to individual

land owners would again be controlled by state law.

* * *

Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, *but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'*

Id. 665, 667, 674-75 (emphasis supplied).

In *California* the Court confirmed that the Secretary is required to conform to state water laws only to the extent he can do so consistently with the provisions of the Act authorizing the project in question and that Congress has the power to override the provision of § 8 and the application of state water law. *Id.* 674.

Relative to a hydroelectric project licensed by FERC under the FPA, it is the licensee, not the Commission, that occupies a position analogous to that of the Secretary relative to a reclamation project authorized by Congress. Under the FPA the role of FERC in licensing hydroelectric projects is analogous to that of Congress in authorizing reclamation projects.

In delegating authority to the Commission to license hydroelectric projects on jurisdictional waters of the United States, it would have been nonsensical for Congress to have appended to § 27 any such language as "and the Commission, in carrying out the provision of this Act, shall proceed in conformity such [state

water] laws." No more does the Commission construct and operate hydroelectric projects than Congress constructs and operates reclamation projects.

Congress' purpose in enacting the Federal Water Power Act being to secure expeditious and orderly development of the power potential of the jurisdictional waters of the United States by delegating comprehensive authority to the Commission to pass upon, license, and regulate hydroelectric projects, it would have made no more sense, and would have been in conflict with what Congress was seeking to achieve, for it to have tacked on to § 27 any such language as "and licensees, in carrying out the provision of this act, shall proceed in conformity with such [state water] laws."

If such a provision were appended, it would be interpreted in like manner as the provision relative to the Secretary in § 8 of the Reclamation Act as meaning "to the extent consistent with the terms and conditions of the license issued by FERC." This, of course, is precisely how the Commission has construed and applied the Act for almost fifty years

Because of the absence from § 27 of the FPA of any provision analogous to that pertaining to the Secretary in § 8 of the Reclamation Act, upon which the decision in *California v. United States* turns, there is no tension between the decision in *First Iowa* construing § 27 and the decision in *California* construing § 8. In the absence from § 8 of the provision applying to the Secretary, it is apparent that § 8 would have been interpreted in *California* as was § 27 in *First Iowa*. In *California* the Court said:

> That section [§ 8] does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the control, appropriation, use or distribution of water.

III. None of California's Other Propositions Is Sustainable

California argues further (A) that the legislative history of the FPA indicates that Congress intended to defer to state water law; (B) that the construction of § 27 in *First Iowa* is dictum; (C) that affirming the exclusive authority of FERC to license hydroelectric projects on the jurisdictional lands and waters of the United States may result in inconsistent regulation of water rights in the same stream; and (D) that the by-pass requirement the state would impose on the project in this case does not conflict with the conditions of the license for the project issued by FERC.

A.

In aid of the proposition that the authors of the FPA intended to defer to state water law, California extensively quotes remarks addressing the bills that were before Congress from 1914 through 1917, H.R. 16673 (63d Cong.) and H.R. 408 (64th Cong.). Cal. Op. Br. 23-30. California does not tell us that these bills did not contemplate an exercise by Congress of its power under the commerce clause over jurisdictional waters of the United States nor provide for the licensing of projects on such waters.

Essentially, they provided:

> That the Secretary of the Interior be, and hereby is, authorized and empowered . . . to lease to citizens of the United States . . . *any part of the public lands of the United States* (including Alaska), reserved or unreserved, . . . for the purpose of constructing, maintaining, and operating dams [and other facilities] necessary or convenient to the development, generation, transmission, and utilization of hydroelectric power. . . .

See H.R. Rep. No. 16, 64th Cong., 1st Sess., 1-2 (1916) (emphasis supplied).

Thus, all of the remarks quoted on pages 23-30 of California's brief were directed at bills that proposed only to lease federal lands for water power development.

In December 1917, President Wilson asked the House to appoint a special committee to consider a bill for the comprehensive development of water power not only on lands but also in waters under the jurisdiction of the United States, which he had asked the Secretaries of War, Interior and Agriculture to draft. The Secretaries' bill, which provided for the development of water power on the lands and waters of the United States, was the prototype of the bill enacted in 1920. *See* H.R. Rep. No. 715, 65th Cong., 2d Sess., 13-15 (1918). It is noteworthy that the tenor of congressional remarks after 1917 quoted by California (Cal. Op. Br. 30-32) is generally quite different from that of the remarks quoted by California directed at the earlier bills and that some of the later remarks, *e.g.*, those of Congressman Myers, *id.* 34, show that the speaker was misinformed as to the content of the bill then before the Congress.

The "long and colorful legislative history" of the FPA was comprehensively presented and thoroughly considered in *First Iowa*, 328 U.S. at 171, and California's dissatisfaction with the Court's reading of it almost fifty years later hardly provides an adequate basis for review. *Cf. Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 419-22 (1986).

B.

California's contention that the Court's construction of § 27 in *First Iowa* is dictum is difficult to credit.

The project the Commission there had found best adapted to the development of the waterway, and wanted to license, called for an eight mile diversion of virtually the entire flow of the Cedar River to a power plant on the Mississippi River and its subsequent disgorgement into that river. A statute of Iowa forbad the issuance of any permit for a project by state authority unless "any water taken from the stream in connection with the project is returned thereto at the nearest practical place." 328 U.S. at 165-66. The state asserted that under its law the project could not be constructed. *Id.* at 170-71. As there can be no question that the state statute related "to the control, appropriation, use or distribution of water," within the terms of § 27 broadly construed, the question was squarely presented whether § 27 precluded the grant of a license by the Commission. The Court's conclusion that it did not was not dictum, it was the heart of the case.

C.

California's plea, that affirmance of the principle—that the Commission's jurisdiction to license hydro-

lectric projects on the lands and waters of the United States is exclusive of any overlapping or concurrent jurisdiction in state agencies—will complicate the management of water resources, is apocryphal.

One reading California's brief, who did not know better, would suppose that FERC's assertion that it has exclusive authority to prescribe the conditions of operation of a project licensed under the FPA, is something new and previously unheard of. In truth, of course, the principle has been at the core of our national water development policy at least since *First Iowa* and has been repeatedly confirmed by an unbroken line of authority. *See Town of Springfield v. McCarren*, 549 F. Supp. 1134, 1154 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983), *cert. denied*, 464 U.S. 942 (1983).

Part I of the FPA, as construed and applied in *First Iowa*, has served well for many years and has caused no particular difficulties for state agencies charged with the administration of local water laws. Beyond glittering generalities, liberally laced with sequins of chauvinism, California does not tell us what problems the existence of the Commission's longstanding jurisdiction has created.

It is nonsense to suggest that, in the absence of the Commission's jurisdiction, the nation's streams would be amenable to management by state agencies under unitary regimes. The law of our rivers invariably involves a complex of federal and state and, sometimes, international jurisdictions. The regulation of waters for the purposes of interstate and foreign commerce and for uses on federal reservations is the function and responsibility of the United States. In the case of reclamation and other water projects spe-

cifically authorized by Congress, state water laws apply only to the extent provided by Congress, which, as in the case of the Boulder Canyon Project, may be not at all. *California v. United States*, 438 U.S. at 674. Section 8 of the Reclamation Act itself displaces state law in so far as state law would permit water rights appurtenant to project lands to be separated therefrom and § 5 displaces state law insofar as state law would permit ownership of project lands in excess of the congressionally prescribed limits. *Id.* at 668, n. 21. Treaties and compacts further restrict the authority of states over waters within their boundaries, as do a number of federal acts for the protection of natural resources and the environment, the Clean Water Act being one of many examples of the latter.

Far from simplifying the management of water rights, the vestment of concurrent jurisdiction in the states over matters currently within the exclusive jurisdiction of FERC would result not only in confusion confounded but would undo the very thing Congress strove so hard to do in adopting the FPA seventy years ago: lodge the authority to secure the development of the water power potential of the lands and waters of the United States under its control in a single federal agency.

D.

California's proposition that the by-pass flows ordered by its water resources control board, being substantially greater than those ordered by FERC, are not incompatible with the license for the project (because the greater includes the lesser and maintenance of the greater by-pass flows ordered by the board

would satisfy the Commission's prescription of lesser flows) disingenuously ignores the fact that every cubic foot of water shunted from the turbines reduces the energy output of the project, on which its viability depends.

Determining the suitability and feasibility of projects and prescribing their modes of operation are matters Congress has committed squarely to the exclusive authority of FERC. As the quantity of water available to drive the turbines is critical to the feasibility and economics of a hydroelectric project, FERC cannot perform the responsibilities assigned it by Congress unless it can regulate flows through the power house without being overridden by state agencies.

IV. While Thoroughly Reviewing and Extensively Revising the FPA, Congress Recently Reconfirmed the Exclusiveness of the Commission's Jurisdiction

In 1986, incident to adopting the Electric Consumers Protection Act (ECPA), Pub. L. 99-495, 100 Stat. 1243, Congress revisited and extensively revised the FPA for the purpose, among others, of requiring the Commission in licensing projects to give equal consideration to the protection and enhancement of fish and wildlife and other natural resources as to the development of water power. Although Congress mandated that the Commission thoroughly consider the views and recommendations of state and federal fish and wildlife agencies, among others, in determining provisions to be made for the protection and enhancement of such resources, it left no doubt that the Commission is to remain the final arbiter. *See* § 10(j) of the FPA (16 U.S.C. § 803(j)); H.R. Rep. No. 99-507 at 22 (1986) (1986 U.S. Code, Cong. & Adm. News at 2509); H.R. Conf. Rep. No. 99-934 at 23

(1986) (1986 U.S. Code, Cong. & Adm. News at 2540). *See also Square D Co. v. Niagara Frontier Tariff Bureau, supra.*

Typically, several agencies of a state are authorized to permit various activities that, broadly speaking, relate "to the control, appropriation, use, or distribution of water." The constituencies of many of these agencies are hostile to any further development of streams for the generation of electric energy. Without risk of overstatement, it can be said that, as the experience of Klamath Falls demonstrates, there will be few hydroelectric projects built if these agencies are recognized as possessing jurisdiction "concurrent" with that of FERC to approve or disapprove their development. And it needs be stressed that, if California's claim of entitlement to set conditions of operation at variance with those prescribed by FERC were sustained, the power would extend not only to proposed but to all existing projects as well. After considering the matter of the allocation of authority in connection with the formulation of ECPA, Congress concluded it was imperative to leave exclusive authority with FERC to decide finally whether a project should be permitted and, if so, on what terms and conditions.

After all, the FPA provides for the development of lands and waters under the jurisdiction of the United States, of national rather than state resources. As the Court concluded in *First Iowa*:

> The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.

> It is the Federal Power Commission rather than [state agencies] that under our constitutional Government must pass upon these issues on behalf of the people of [the state] as well as on behalf of all others.

328 U.S. at 182.

CONCLUSION

It is respectfully submitted that the judgment of the court below must be affirmed.

Respectfully submitted,

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No. 89-333

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA, PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MODESTO IRRIGATION DISTRICT AND TURLOCK IRRIGATION DISTRICT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT, THE FEDERAL ENERGY REGULATORY COMMISSION

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QUESTION PRESENTED

Should this Court overrule *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), and nearly 45 years of Supreme Court precedents and administrative practice so that the State of California can assume control over hydroelectric power projects already constructed or planned for construction?

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INTEREST OF *AMICI CURIAE*

This Brief is filed pursuant to Supreme Court Rule 37 by the Modesto Irrigation District and Turlock Irrigation District ("the Districts") as *amici curiae* in support of Respondent, the Federal Energy Regulatory Commission ("FERC"). The Districts are California irrigation districts organized and operated under the California Water Code, and are agencies of the State of California exercising governmental functions, *see* Cal. Water Code § 20570. This brief is sponsored by the chief legal representative of each irrigation district. Consequently, no consents to the filing of this brief are required under this Court's Rule 37.5.[1] These Districts *oppose* the position advocated by the State of California in this case, as ill-advised, unworkable, and contrary to Congress' intent and longstanding legal precedent.

[1]Nevertheless, the Districts do have the consent of the parties to file this brief.

The Districts hold an FERC license for the construction and operation of a 165 megawatt hydroelectric plant on the Tuolumne River in California, which became operational in 1971 and was built at an original cost of about $92.5 million. By amendment to the license, the FERC recently authorized the addition of a fourth generating unit at the plant and approved amendments to provide for additional fish studies agreed upon by the Districts and the California Department of Fish and Game and the U.S. Fish and Wildlife Service. Article 37 of the license sets forth the minimum flow release schedule for the protection and maintenance of fish below the dam under normal, dry, and critically dry runoff conditions. The normal water year schedule was modified by agreement of the Districts and the California Department of Fish and Game as authorized by Article 37 and the modified schedule was approved by the FERC in the above license amendment. The FERC retains authority to make further changes as may be required, upon notice and an opportunity for hearing.

From 1971 until 1985, the Districts operated their jointly owned project, called the "New Don Pedro Project" (hereinafter "New Don Pedro") in harmony with the state agency responsible for administering state water rights, the State Water Resources Control Board ("State Board"), represented by the Petitioner. Since 1985, the State Board has taken the position that it has the power to impose fish water release requirements different from and more burdensome than the FERC requirements, and the right—on an after-the-fact basis—in effect to attach conditions to the outstanding FERC license for New Don Pedro. The State Board's justification for this position has been the public trust doctrine, which as interpreted by Petitioner purports to allow reallocation of water from vested rights to so-called public uses. As *amici curiae* in this proceeding, the Districts oppose any change in the supremacy of FERC hydroelectric power licenses and support the Ninth Circuit's determination that the holders of such licenses, once issued, are free from interference by state agencies in areas covered by the FERC license.

SUMMARY OF ARGUMENT

In the court below, the State of California boldly sought to usurp through "state preemption" the congressionally mandated powers of the FERC and take over the management of new and existing hydroelectric projects on the navigable rivers of California. The Ninth Circuit rejected California's position based on this Court's ruling in *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), which held that Congress intended the Federal Power Commission (now FERC) to have exclusive licensing and supervisory authority over hydroelectric plants on navigable waterways. In *First Iowa*, this Court examined the text of the statute, its structure, purpose and legislative history, and rejected the claim of the State of Iowa that a state veto and dual sovereignty were intended by Congress.

California contends that the time has come for this Court to overrule *First Iowa*. Yet it cites no persuasive reason for this Court to do so. The Court has consistently adhered to the view it expressed in *First Iowa*. In its Ninth Circuit briefs, the State purported to find "new" legislative history that justified its view, but as the Ninth Circuit recognized, 877 F.2d at 749-50; Pet. App. A-12 to A-13, the very extracts from the congressional debates the State cited were considered by this Court in 1946 and found not persuasive.

The State claims that *California v. United States*, 438 U.S. 645 (1978), justifies departure from *First Iowa*, neglecting to concede that this Reclamation Act case is now 12 years old and that *First Iowa* has been thereafter repeatedly cited as authoritative by this Court. *California v. United States* restored to Section 8 of the Reclamation Act the meaning found in it from 1902 to 1958; the State would use that case to deprive the Federal Power Act of the settled meaning it has enjoyed since 1946.

The dual sovereignty that the State seeks in this case is unworkable. For example, the FERC established a June bypass flow of 11 cubic feet per second ("cfs") for the Rock Creek project,

thereby simultaneously allocating the remaining flow for hydropower generation. The State Board later decreed a June bypass flow rate of 60 cfs. If the FERC mandated minimum bypass flow is 11 cfs, it cannot also be 60 cfs because the 60 cfs bypass flow results in a different allocation of water between the two competing uses. One agency must decide how much water shall be released for the protection of fish below a hydroelectric project. California says it should decide; the statute, this Court's precedents and nearly 45 years of history say it should not—the FERC should decide. This Court should reject California's arguments and affirm the Ninth Circuit decision because there is no reason for the Court to reopen the issues settled long ago in *First Iowa*.

ARGUMENT

I.

INTRODUCTION

This Court is not writing on a clean slate. In 1946 the Court carefully reviewed the great debate leading to the Federal Power Act of 1920 ("FPA")[2] and confirmed that Congress intended for the Federal Power Commission to exercise the full measure of federal authority in administering power development of the nation's rivers. *See First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946). The Court concluded that Congress intended for states to exercise only an advisory role in recommending to the FPC how to manage power developments within their borders. *First Iowa* controls the instant case and should not be overruled.

Nevertheless, California argues its position here as though the Court faces an issue of first impression. For example, California analyzes the legislative history of the Federal Power Act's adoption in 1920, failing to note that this Court exhaustively analyzed the same legislative history nearly forty-five years ago in 1946, when deciding *First Iowa*. California exhorts this Court with policy arguments for how best to administer the nation's hydroelectric projects and power networks. *See, e.g.*, Petitioner's Opening

[2]41 Stat. 1063 (1920).

Brief, at 18-22, 45-47. Yet, despite California's invitation, this Court is not a super-agency mediating disputes about water uses at federal power projects and attempting to create by judicial decree the best or most efficient structure for managing all the various FERC-licensed power projects. Congress has already done this and the agency it vested with such authority is the FERC and not the State of California. This Court has already exercised its role in *First Iowa*, which is merely to construe the Federal Power Act, which Congress adopted in 1920. This Court then concluded that the Federal Power Commission, not the states, has authority to regulate stream flows at FPC-licensed projects. Many hydroelectric projects have been constructed in reliance on the Court's ruling in *First Iowa*.[3]

This case does not involve a dispute concerning the extent of a state's authority to allocate consumptive use of surface waters within its boundaries. This is not a water rights case. Instead, this case presents the question of whether Congress may vest authority in a federal agency to regulate integral features of federally licensed energy projects on the nation's rivers. The answer is that Congress may vest such authority in a federal agency, that it has done so in the Federal Power Act, and that conflicting state regulations must give way to such preemptive federal authority.

Stream flows are not simply an aesthetically pleasing, relatively flexible feature at FERC-licensed hydroelectric projects; stream flows and water storage are the soul of a project. Hydroelectric dams exist for the purpose of storing or diverting water to run through turbines and generate electricity at times when power is needed (as well as for irrigation and other consumptive uses). Water that is required for instream flows for fish is not available

[3]The massive power projects that Congress envisioned came to fruition and now dominate the major navigable rivers of the country. The diverse water works and power networks managed by the FERC transcend state boundaries, spanning entire river basins and requiring coordination at all levels of stream flows, water storage, and power generation. In reliance on the administrative structure that Congress protected from parochial control by the several states, hydropower project sponsors (and their bondholders) have invested billions of dollars to create and maintain the massive power system Congress envisioned.

for project storage, consumptive uses, or future power generation. When the FERC issues a license for a project, it carefully considers, with participation from the states, local governments, environmental groups and other interested parties, the multitude of factors that affect what level of instream flows should be required at the project.

To fulfill its congressional mandate to administer federal power projects within its jurisdiction, the FERC must have authority to determine project flows. This case concerns the meaning of the statute that gave the FERC plenary authority to regulate hydroelectric projects within its jurisdiction. This Court construed that statute nearly forty-five years ago in *First Iowa* and concluded that states may not veto the FERC's determination of project flows. Congress has not acted since then to vest such veto authority in the states.[4] This Court should decline California's invitation to rewrite the Federal Power Act to suit the state's agenda.

II.

FIRST IOWA HAS BEEN UNIFORMLY FOLLOWED BY THIS COURT AND SHOULD NOT BE OVERRULED

A. This Court Has Repeatedly Reaffirmed *First Iowa*.

This Court has uniformly adhered to *First Iowa*'s holding that the Federal Power Act of 1920 preempted all state regulation of hydroelectric power projects licensed by the FERC. As recently

[4]Nothing has happened in the forty-four years since this Court's ruling in *First Iowa* to modify this Court's perspective on what Congress intended when it adopted the Federal Power Act in 1920. This Court had available then the same indicia of original legislative intent it has now. Moreover, Congress, through its decision not to tamper with the balance of federal authority struck in the FPA, has ratified and concurred in this Court's frequently reiterated conclusion that Congress intended for the FPC to exercise comprehensive federal authority. On questions of statutory interpretation, this Court defers to Congress to amend a statute to meet perceived changes in the nation's needs. *See Patterson v. McLean Credit Union*, 491 U.S. ___, 109 S.Ct. 2363, 2370 (Kennedy, J.) & 2385 (Brennan, J., concurring) (1989) (special justification required for departure from *stare decisis* on matters of statutory interpretation).

as 1982, in *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338, n.6 (1982), the Court unanimously noted that, regardless of the extent of a state's proprietary interest in a river that is the source of power for a FERC-licensed hydroelectric project, "the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government." Citing *First Iowa*, the Court noted that the state's purported " 'ownership' " of the river "provides no justification for restricting or conditioning the use of these federally licensed units." *Id.*

Similarly, in 1983, the Court summarized the *First Iowa* holding with respect to the preemptive purpose and sweep of the Federal Power Act in order to distinguish it from the Atomic Energy Act which did not give the NRC comprehensive planning responsibility. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 223, n.34 (1983). The Court stated:

> In *First Iowa*, this Court held that compliance with requirements for a state permit under Iowa law was not necessary in order to secure a federal license for a hydroelectric project. Allowing the States to veto federal decisions could 'destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of [the Federal Government].' Id., at 164. In the same manner, requiring compliance with state requirements would have reduced the project to a size that the Federal Power Commission had determined was inadequate, and compliance with state engineering requirements could handicap the financial success of the project.

Id. In addition, in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984), the Court discussed Congress' purpose in passing the Federal Power Act and noted, citing *First Iowa*, that Congress intended to vest in the Commission exclusive authority to issue licenses for hydroelectric projects in "order to eliminate the inefficiency and confusion caused by the 'piecemeal, restrictive, negative approach' to licensing prevailing under prior law." Thus, very recent Court deci-

sions have reaffirmed *First Iowa*'s holding with undiminished force. Contrary to the claims of California this Court clearly does not regard *First Iowa* as being undermined by recent preemption and reclamation cases.

B. This Court Has Repeatedly Found That The Federal Power Act Vests Comprehensive Regulatory Authority In The FERC.

Since *First Iowa* the Court has revisited on several occasions the question of Congress' purpose in passing the FPA. Repeatedly, the Court has emphasized Congress' intent to preempt the field with federal regulation of hydroelectric projects. For example, in *FPC v. Union Electric Co.*, 381 U.S. 90, 97-98 (1965), the Court explained that Congress intended to exercise "comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious." Quoting *First Iowa*, the Court observed that the 1920 Act " 'was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so . . . .' " *Id.* at 99. In studying the legislative history, the Court found that "conservationists and opponents seemed to agree that the Act embodied the full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects." *Id.* at 107.

The Court has observed how a state's licensing requirements can interfere with a comprehensive scheme of federal regulation. Citing *First Iowa*, the Court explained that: "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or

which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry v. Florida*, 373 U.S. 379, 385 & n.4 (1963). Similarly, the Court has declared: "It is no longer open to question that the Federal Government under the Commerce Clause of the Constitution . . . has dominion, to the exclusion of the States, over navigable waters of the United States [citing, among other cases, *First Iowa*] . . . Congress has elected to exercise this power under the detailed and comprehensive plan for development of the Nation's water resources, which it prescribed in the Federal Power Act, to be administered by the Federal Power Commission. [citing *First Iowa*]" *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958). In addition, in *Federal Power Comm. v. Oregon*, 349 U.S. 435 (1955), the Court, interpreting § 27 of the Federal Water Power Act and reaffirming *First Iowa*, explained:

> There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others [quoting Section 27 in a footnote]. To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. . . . No such duplication of authority is called for by the Act. [Quoting in a footnote the portions of the *First Iowa* decision discussing the threat of a state veto to comprehensive planning by the FPC.]

Id. at 444-45 and nn.15, 16.

C. *First Iowa* Controls Resolution Of This Case.

The Court's clear language in *First Iowa* and subsequent cases leaves no room for the strained distinctions that the State of California tries to draw here to distinguish *First Iowa*. California is asking this Court to overrule *First Iowa* and nearly 45 years of consistent precedents so California can seize control of FERC-authorized hydroelectric projects and dictate the terms under which they will continue to operate.

California advances two arguments to persuade this Court to depart from the unbroken line of authority following *First Iowa*: (1) that *First Iowa* was not concerned with water rights; and (2) that the language directed to Section 27 of the FPA was dictum, unnecessary to the decision. Petitioner's Opening Brief, at 36-38 & n.18. Both points are simply wrong.

According to what the State of Iowa told this Court at the time *First Iowa* was decided, the purpose of the state law at issue in that case was "to conserve and protect as far as possible all public and riparian rights in the waters of the state . . . Surely, no one can contend that this language [of the Iowa statute] does not refer to the appropriation, diversion and use of water for power purposes." *See* Petition for Rehearing by State of Iowa, at 13 (1946) (filed in *First Iowa*).[5] The Iowa law was, in fact, a codification of the common-law riparian water rights rule forbidding trans-basin diversions. Thus, contrary to California's suggestion, the issue in *First Iowa* was the same as that here—the extent to which state laws concerning water rights are preempted by the FPA. *First Iowa* involved more than a state use permit; it involved state-created water rights overridden by the FPA.

Similarly, California's argument that *First Iowa* did not turn on a construction of Section 27 of FPA is also wrong. The Court's analysis of Section 27 in *First Iowa* was an integral part of the conclusions it reached. *See* 328 U.S. at 175-77. California would distinguish between a project operator's acquiring a permit prior to obtaining an FERC license as opposed to a project operator's acquiring a state water right prior to diverting water under an FERC license. But that distinction makes no sense in light of the Court's overriding concern in *First Iowa*. The Court repeatedly emphasized that Congress intended to promote hydropower development through federal licensing and there is no room for

[5]Copies of relevant briefs filed with this Court in the *First Iowa* case were appended to Intervenor, Rock Creek Limited Partnership's brief that was filed with the Ninth Circuit; presumably these *First Iowa* briefs are also readily available in this Court's archives. Therefore, they are not separately appended to this *amici* brief.

state control of matters within the federal plan of regulation. Clearly the diversion of water by a FERC-licensed project is an integral part of the generation of hydroelectric power. If a state imposes conditions on such diversion that conflict with conditions imposed by the FERC—such as the minimum fish flow requirements at issue here—it is interfering with the comprehensive scheme Congress established. *First Iowa* cannot be neatly distinguished on the technical grounds suggested by the State of California and this Court should not now overrule its longstanding precedent in *First Iowa*.

III.

THE STATE'S ARGUMENTS ABOUT THE LEGISLATIVE HISTORY OF THE FEDERAL POWER ACT OF 1920 ARE NEITHER NEW NOR PERSUASIVE; THIS COURT IN *FIRST IOWA* ADDRESSED AND REJECTED THEM

Much of the State's brief is taken up with a detailed review of selected portions of the legislative history of the FPA. The state presents its arguments concerning the legislative history with great fanfare, implying that it has unearthed previously unnoticed but controlling authority that mandates overruling *First Iowa*. According to the State, "The legislative history of the FPA provide[s] the strongest indication that Congress intended to defer to state water rights laws." Petitioner's Opening Brief, at 22.

Unfortunately for the State, its strongest argument is simply a belated reprise of the same legislative history arguments this Court rejected nearly forty-five years ago in *First Iowa*. A few examples illustrate this point and show why this Court should not reexamine the informed interpretation of the legislative history that it reached in 1946 in *First Iowa* and has reaffirmed on numerous occasions since then.

The State of California relies heavily on certain statements by Congressman LaFollette concerning S. 1419 (1918). Petitioner's Opening Brief, at 31-32 & n.15. California's brief neglects to note that in *First Iowa* this Court was aware of, considered, and re-

jected the State's interpretation of Mr. LaFollette's statements. *See First Iowa*, 328 U.S. at 173-74; *see also* Brief For State of Iowa, at 28 (1946) (filed in *First Iowa*); Brief For The Federal Power Commission, at 19 (1946) (filed in *First Iowa*); Brief For First Iowa-Hydro-Electric Cooperative, at 32-33 (1946) (filed in *First Iowa*); Petition For Rehearing By State of Iowa, at 17-19 (1946) (filed in *First Iowa*; the petition for rehearing was denied, 328 U.S. 879 (1946)).[6] The court of appeals in *First Iowa* had also relied on Mr. LaFollette's comments, *see* 151 F.2d 20, 25 n.17 & 28 n.36 (D.C. Cir. 1945). Obviously, when this Court decided *First Iowa* it was not persuaded by California's interpretation of Congressman Mr. LaFollette's statements. The Court heard numerous characterizations of Mr. LaFollette's statements and chose one interpretation of them. Those statements have not changed their meaning with the passage of forty-five years.

The State's brief also relies extensively on comments of Congressman Mondell made in a colloquy with Congressman Raker. *See* Petitioner's Opening Brief, at 33, n.15. Mondell's comments were discussed, quoted and referenced in excruciating detail in the briefs presented to this Court in *First Iowa*. *See* FPC's Brief, at 20 (filed in *First Iowa*); First Iowa Hydro-Electric's Brief, at 34-35 & Appendix pp. 40-42 (filed in *First Iowa*); Iowa Rehearing Petition, at 18-19 (filed in *First Iowa*).

This Court also was made well aware of the sequence and language of bills leading up to the final language of the FPA, to which the State of California imputes great significance here in its attempt to have *First Iowa* overruled. *See First Iowa*, 328 U.S. at 176 n.20; Petitioner's Opening Brief, at 23-35. The First Iowa Hydro-Electric Cooperative included a detailed chronology of the legislative history of the Federal Power Act which makes specific reference to many of the points raised here in the State of California's brief concerning H.R. 16673 (1914), H.R. 408 (1916), S. 1419 (1918), and H.R. 3184 (1920). *See* First Iowa-Hydro-Electric's Brief, at Appendix pp. 37-45 (filed in *First Iowa*). This detailed summary of the legislative history was presented to the court of appeals in *First Iowa* by the Federal Power Commission.

[6]*See supra* note 5.

See id. For example, Congressman Mondell's statements concerning section 14 of H.R. 16673 (1914), which according to the State of California prove that rights to use water at federal power projects must be acquired from the states under the FPA, *see* Petitioner's Opening Brief, at 23-24, was quoted in entirety to both the court of appeals and this Court in *First Iowa*. *See* First Iowa Hydro-Electric's Brief, at Appendix pp. 44-45 (filed in *First Iowa*). Obviously, this Court in *First Iowa* did not find Congressman Mondell's states-rights interpretation of the savings language in section 9 and section 27 of the FPA (as carried forward from section 14 of H.R. 16673) to be controlling. This Court is not in any better position now to reassess its conclusion in *First Iowa* on this aspect of the FPA's legislative history.

This cursory examination of the materials and arguments presented to the Court in *First Iowa* reveals that the Court had full notice of all of the legislative history arguments about the FPA raised in this case by the State of California as well as the many persuasive arguments to the contrary. *See* Iowa's Brief, at 23-28, 36 (filed in *First Iowa*); FPC's Brief, at 19-20, 40, 47-53 (filed in *First Iowa*); First Iowa Hydro-Electric's Brief, at 22-23, 32-35, Appendix pp. 37-45 (filed in *First Iowa*); Iowa's Petition For Rehearing, at 17-19, 24 (filed in *First Iowa*); *see also First Iowa Hydro-Electric Cooperative v. FPC*, 151 F.2d 20, 25 n.17, 27-28 n.36 (D.C. Cir. 1945), *rev'd*, 328 U.S. 152 (1946). The parties to *First Iowa* recited chapter and verse to the Court for the major points now raised by the State of California. Consequently, it is extremely disingenuous for the State of California to argue here that the legislative history of the FPA conclusively demonstrates that Congress intended to permit states to dictate minimum flows at FERC-licensed facilities. As the Ninth Circuit recognized below, California's revisionist interpretation of the selfsame evidence of legislative history was thoroughly considered and rejected by this Court in *First Iowa*. *See* 877 F.2d at 749-50; Pet. App. A-12 to A-13.

Here, the statutory scheme that Congress established is clear. It is difficult to believe that Congress intended for 48 states, as we then were, to have dual control over hydroelectric projects on

navigable waters of the United States. Ample provision was made for the states and their responsible agencies (fish and game, state engineer) to appear and be heard in FPC licensing proceedings. But the thrust of the statute was that the Commission would decide on the value of each project and how it would be constructed and operated. To allow the Commission's orders to be set aside by a state agency is a result so at war with the statutory scheme as to deny the text of the Act. The statute does not reflect the ambiguity attributed to it by Petitioner.

IV.

CALIFORNIA V. UNITED STATES, CONSTRUING THE RECLAMATION LAW, OFFERS NO GUIDANCE FOR THE DECISION OF THIS CASE

California's arguments here boil down to one issue: should this Court overrule *First Iowa* and nearly 45 years of Supreme Court precedents and administrative practice so that the State of California can assume control over hydroelectric power projects already constructed or planned for construction? In asking this Court to overrule its decision in *First Iowa*, California ignores the vast differences between Congress' 1902 program for reclamation of arid lands and its 1920 program for federal administration of hydroelectric projects.

The State of California places great reliance on the Court's decision in *California v. United States*, 438 U.S. 645 (1978) (the *New Melones* case), which required the Secretary of the Interior to conform to state law in administering irrigation projects under the 1902 Reclamation Act. But the *New Melones* case is not a proper guide for the decision of this case. It was governed by the Reclamation Act of 1902; this case is governed by the Federal Power Act of 1920. The historical forces that produced the two acts and the problems they were designed to solve were quite different.

California's revisionist interpretation of history carefully avoids facing the differences between Congress' reclamation program in 1902 and its program to regulate and promote development of federal power in 1920. *See* Petitioner's Opening Brief, at 17 ("the similarities of the programs are stronger than their differences . . ."). California knows that this is the fundamental weakness in its argument. For California it is enough to say that the statutory language is similar, that both statutes created federal agencies, and that both programs provide for development of water for economic purposes. *Id.* California may be persuaded by such superficial analysis;[7] yet this Court was not and should not be. The Court cannot reverse the course of nearly 45 years of history of federal power development and regulation without probing deeper into the differences between federal power programs and the reclamation programs that California holds out as an example. Too much is at stake here for that.

The Court's decision in the *New Melones* case was influenced in large part by the history and purposes of the reclamation laws, which the Court viewed as rooted in and interwoven with state law. As the Court noted, the reclamation laws reflect a sort of "cooperative federalism"; in the Reclamation Act of 1902, Congress "merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended." 438 U.S. at 650-51. Congress' goal was to help state and local governments in the western states finance projects to store their water.

The Reclamation Act was originally intended to conquer the desert by bringing irrigated agriculture to arid western lands. It created a public works program in which the federal government supplied the otherwise absent capital for irrigation development.[8] The Bureau of Reclamation built and operated the projects within

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[7]Nevertheless, California's representatives clearly know that the reclamation program was a public works program meant to promote state and local irrigation projects while the federal power program was not. *See, e.g.*, R. Walston, *Storm in the Desert: The Great Western Water Wars*, 26 *Journal of the West* 78 (July 1987) (discussing in detail the history behind and reasons for federal reclamation projects).

[8]*See generally* A. Golze, *Reclamation in the United States* 19-34 (1961) (cited in *California v. United States*, 438 U.S. 645, 649 nn.1-3 (1978)); 2 R. Clark, *Waters and Water Rights*, §§ 110.1, 110.2, at 120-21 (1967).

the framework of a state legal system that provided the water rights and authorized the organization of water districts that obligated themselves to pay construction, operating and maintenance costs.[9] In the absence of state law, there was no project.

The Federal Power Act stands in stark contrast to the Reclamation Act. The FPA is a regulatory statute, in the tradition of the Interstate Commerce Act of 1887, 24 Stat. 379 (1887) (which established the Interstate Commerce Commission) and the Federal Trade Commission Act of 1914, 38 Stat. 717 (1914) (which established the Federal Trade Commission) and was a forerunner of the regulatory agencies of the 1930s. The purposes of the FPA were three-fold: (1) to promote hydroelectric power on federal lands and on navigable waterways controlled by the federal government; (2) to give preference to public entities such as municipalities in the use of the power; and (3) to capture for the government some of the economic rents of water power, first by charges to licensees and second by recapture provisions upon expiration of licenses. This pervasive regulatory scheme could and did provide protection in Section 27 for vested water rights established under state law. It had no room for supervening regulation of the projects by state administrative agencies.[10]

The State of California would like to persuade this Court, with "revisionary zeal," *see California v. United States*, 438 U.S. 645, 693 (1978) (White, J., dissenting), to change the law, as it pur-

[9]The Turlock Irrigation District and Modesto Irrigation District do not receive any Bureau of Reclamation water.

[10]*See generally* 4 R. Clark, *Waters and Water Rights* § 330, at 293-94 (1970). Theodore Roosevelt recommended in 1908 that "although works for improvement of navigation, power development, irrigation, flood control, and water supply for domestic and manufacturing purposes should continue, the time had come to merge local projects and uses of inland waters in a comprehensive plan designed to benefit the Nation as a whole." *Id.* at 293 (citing 42 Cong. Rec. 6988 (1908)). Private and public power interests continued to fight over how to develop a comprehensive plan for the development of the nation's waterways. *Id.* at 294. The conservationists prevailed, establishing in the FPA a national policy on the "use and development of water power on public lands and navigable streams." *Id.*

portedly did in the *New Melones* case. But the State's premise is wrong. *New Melones* did not change the law; it restored to Section 8 the meaning it had from 1902 to 1958 and repudiated the apparent departures from that meaning appearing in dicta in the late 1950s. Until then federal-state relations under the Reclamation Act followed a familiar, well-worn path for more than 50 years from the Act's adoption in 1902—a path marked by milestones such as *Nebraska v. Wyoming* and *Gerlach*, in which the Court routinely rejected claims of federal supremacy and reaffirmed deference to state law mandated by Section 8 of the Reclamation Act.[11]

Only when patently insupportable claims under state law were advanced did this Court—unnecessarily—depart from deference to state law under Section 8. Thus in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 288 (1958), the petitioner, in a brazen attempt to evade acreage restrictions imposed by the 1902 Act, asserted that state law forbade such restrictions. Unfortunately, instead of giving the simple answer that Section 5 of the 1902 Act set forth a specific congressional directive that was intended to override any contrary provision of state law, the Court undercut Section 8 and its deference principle. 357 U.S. at 290, 295-97. The achievement of the *New Melones* case was to point out the unnecessary deviation from prior decisions represented by *Ivanhoe* and to restore the principle of deference embodied in Section 8.

[11]*See United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Nebraska v. Wyoming*, 325 U.S. 589 (1945). In *Nebraska v. Wyoming*, Nebraska challenged diversions by Wyoming and Colorado of irrigation water from the North Platte River and sought an equitable apportionment of the waters from that river. 325 U.S. at 591-92. The Court confirmed that Section 8 of the Reclamation Act of 1902 required the federal government, as a "carrier and distributor" of reclamation project water, to conform with state law concerning the appropriation and use of such water. 325 U.S. at 614-15.

In *United States v. Gerlach Live Stock Co.*, the United States challenged private parties' claims for compensation arising from loss of riparian rights caused by construction of the Central Valley Project in California. 339 U.S. at 727-28. The Court concluded that when Congress instructed that the reclamation law would govern construction of this project, Congress intended the Secretary of Interior to proceed in compliance with state laws concerning appropriation and use of such water. 339 U.S. at 734-36, 739-42.

The FPA has no comparable legal history. From the time this Court first spoke in 1946, in *First Iowa*, the Act has been characterized as a pervasive licensing and regulatory system administered exclusively by a federal agency. There is no occasion for this Court to re-examine the FPA because, unlike Section 8, its interpretation has been uniform and unbending in respect to the necessity of federal supremacy. The Reclamation Act did not preempt state law; with reclamation projects Congress directed the Bureau of Reclamation to proceed in conformity with state law. In stark contrast, the Federal Power Act was the product of a heated and bitter debate in which the need for power was balanced against the need for conservation by placing all projects governed by the act under the exclusive regulatory control of the Federal Power Commission. The role of conflicting state regulation was specifically addressed in the debate in Congress over the FPA and Congress deliberately chose to preempt such conflicting state rules by dividing control by subject matter and giving each entity final authority within its jurisdiction. *See First Iowa*, 328 U.S. at 167-68. Congress decided to protect against the risk that states would veto projects that satisfied federal requirements. *See id.* at 164. Thus, the FPA is not an example of legislation where Congress' preemptive intent was unclear; Congress clearly chose for federal authority to preempt overlapping or conflicting state regulation.[12] The states and their agencies have ample opportunity to voice their concerns through appearances before the Com-

[12]The evidence of preemption is clear in this case. The Court in *First Iowa* reviewed the language and legislative history of the Federal Power Act and concluded that Congress intended "to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation . . ." 328 U.S. at 181. The Court thereby distinguished the FPA from the Rivers and Harbors legislation cited by the State for the proposition that federal and state authorities have dual authority over matters in navigable waters. *See* Petitioner's Opening Brief, at 40, 48. The Court concluded that, "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. There is no question that regulation of project releases—the point of dispute in the instant case—is an integral part of the FERC's regulatory task under the FPA. Therefore, it is clear that California's conflicting proposals must give way under established preemption doctrine.

mission, and through their continuing authority over the proprietary matters as discussed by the Court in *First Iowa*.

The State's position in this case comes down to a naked assault on established, heretofore unchallenged law. *New Melones* offers no comfort, for it *restored* the Reclamation Act's historical meaning by reaffirming the first 50 years of interpretation of that Act by this Court. Yet the State would use *New Melones* to overturn nearly 45 years of settled interpretation and administration of the FPA under this Court's rulings. In short, the State would expand *New Melones* beyond recognition in order to gain control over hydroelectric projects—a control that Congress never intended the states to have and that no court has ever validated.

V.

THE STATE'S ARGUMENTS ABOUT ADMINISTRATIVE INTERPRETATION ARE NOT RELEVANT HERE

The State of California and the *amici* States have made passing reference to the alleged contemporaneous administrative interpretation of the FPA prior to this Court's definitive ruling in *First Iowa* in 1946. *See* Petitioner's Opening Brief, at 35, n.17; Brief of Amici States, at 20-24. An administrative interpretation that may have been followed more than 45 years ago—and not followed at any time since—is not relevant to this Court's interpretation of the legal issues raised by the FPA. If principles of deference to administrative interpretation are to guide the legal interpretations made on this appeal, *see, e.g., Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is the current interpretation, advanced here by the FERC and followed and relied on by private parties for nearly 45 years, that is relevant.

Even so, California and the *amici* States' summary of the Federal Power Commission's interpretation of the FPA prior to 1946 is inaccurate. The most reliable summary of the FPC's position appears in its brief to this Court in *First Iowa*. *See* FPC's Brief

(filed in *First Iowa*). The FPC's position then, although problematic now in light of the Court's resolution of matters in *First Iowa*, clearly does not lead to the position advocated here by the State of California.

The FPC went to great lengths in 1946 to distinguish the FPA from the earlier Rivers and Harbors legislation and call the Court's attention to the unique legislative history of the FPA. *See* FPC's Brief, at pp. 47-57 (filed in *First Iowa*). The FPC stressed that the Court should not ignore the "whole chapter of American history" by which conservationists, after extensive debates, secured "enactment of a complete scheme of national regulation which would affirmatively encourage and promote the comprehensive development and utilization of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted." *Id.* at p. 47. Congress, according to the FPC in 1946, sought to create "a complete scheme of regulation intended to secure and promote the comprehensive development of water resources subject to Federal control, in the public interest." *Id.* at p. 53. It is not insignificant that this Court appears to have borrowed and thereby endorsed this language from the FPC's Brief in presenting the Court's interpretation of the FPA in *First Iowa*. *See* 328 U.S. at 180-81.

Therefore, the State of California's arguments about the FPC's administrative interpretation from 1920 to 1946 are misplaced and should be rejected. The FPC's position even prior to 1946 does not lead to the dual control sought here by the State of California.

VI.

CALIFORNIA'S POSITION MAKES NO PRACTICAL SENSE AND DOES NOT NECESSARILY LEAD TO GREATER PROTECTION OF FISHERIES

California argues in this action that it has exclusive authority to regulate minimum project flows at an FERC-licensed hydro-

electric facility in order to impose more stringent requirements on the operator than the FERC has imposed. California implies in its Petition that such exclusive regulation of flows by the states is workable, does not infringe upon the FERC's prerogative, and will lead to greater protection of fish. Yet, in fact, California's proposed "state preemption" makes no practical sense, directly infringes on the regulatory prerogative that Congress intended the FERC to exercise, and merely transfers final decisionmaking authority from the FERC to the states without any assurance that states will be any more or less protective of fish than the FERC.

A. California's Interpretation Of The FPA Is Unworkable.

Both Congress and this Court recognized the practical problems that inhere in a system in which two separate decisionmaking entities have the right independently to set the parameters for operation of hydroelectric projects. California here is advocating precisely the veto power and overlapping jurisdiction that Congress sought to eliminate with the comprehensive program of federal regulation created in the Federal Power Act. The Court construed the FPA in *First Iowa* as preemptive of state laws that conflict or interfere with the FPC's regulatory authority at FPC-licensed projects precisely to prevent a state from exercising a veto: "Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." 328 U.S. at 164. The Court stated: "A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad." *Id.* at 168.

California attempts to gloss over the unworkability of state regulation of FERC project flows by arguing here that it is not interested in obtaining veto power over FERC-licensed projects. *See, e.g.,* Petitioner's Opening Brief, at 48-49. The State argues

that it is not infringing on the FERC's prerogative when it sets more stringent conditions than the FERC, *id.* at 48-49, an argument that the Ninth Circuit rejected as, in effect, a veto of the project. 877 F.2d at 749; Pet. App. A-12. Veto, in the sense of "forbid," may not be the State's usual objective, but displacement of any other authority certainly is. When the FERC sets 100 cfs of water for fish, it is simultaneously assuring the availability of the remaining supply for other uses. When the State Board sets 175 cfs for fish, it is allocating 75 cfs less for other uses than the FERC ordered. The basic mistake of the State's thinking is revealed in the statement that the State has set more stringent conditions and hence there is no conflict between the State Board's order and the FERC's order. The test is not how stringent are the requirements for fish; rather, conflict occurs because of differences between the State Board and the FERC over amounts of water allocated for power. The State Board's more stringent requirement for fish is an invasion of the FERC's requirements for power. Each state agency has had the opportunity to fight out before the FERC the amount of water to be released for fish. The fight is a charade if, after losing, the state agency imposes its desires anyway.[13]

This Court clearly recognized in *First Iowa* the same ploy attempted here by the State of California: "Compliance with State requirements that are in conflict with federal requirements may well block the federal license." 328 U.S. at 167. Congress intended for the FERC to draw the line in setting conditions for operation of hydroelectric facilities, between environmental requirements and economic feasibility.[14] Yet the position the State of California is advocating here effectively makes all terms and conditions of FERC licenses superfluous because the State can specify its own construction conditions and operating conditions. Obviously, neither Congress nor this Court envisioned states playing such a role at FERC-licensed projects.

[13] *Amici* American Rivers, et al. contend that imposition of state-mandated minimum flows at FERC-licensed projects is analogous to Army Corps of Engineers participation in regulating water pollution at hydroelectric projects. Brief of Amici Curiae American Rivers et al. in Support of Petitioner, at 29-31. Such Army Corps participation is the result of Congress' "radical change in legislative policy" wrought in the Federal Water Pollution Control Act Amendments of 1972, *see* Monongahela Power Co. v. Marsh, 809 F.2d 41, 45 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987), and sheds no additional light on Congress' intent in the entirely separate legislation at issue in this case—the FPA—which this Court definitively construed in *First Iowa*.

Unlike the FERC, the states are not charged with balancing the need for power against the need for promotion of fisheries. If the FERC is construed as having exclusive control over power, and the State has controlling jurisdiction to promote fisheries, no agency will ever balance these interests.

B. State Regulation Of Stream Flows At FERC-Licensed Projects Will Not Lead To Greater Protection And Enhancement Of Fish.

California also tries to make its extreme position palatable by implying that exclusive state authority over stream flows will lead to greater protection and enhancement of fish for recreational and commercial purposes. California suggests in its Brief that the purpose of its more stringent minimum flow requirements for the Rock Creek project is to protect trout, a recreational fish. Petitioner's Opening Brief, at 2-3. Nevertheless, the State's proposed interpretation of the FPA will not necessarily operate to advance greater protection and enhancement of fish either within or outside California.[15]

[14] Indeed, the FERC concluded in this case that the state's recommended minimum flows would jeopardize the economic feasibility of the Rock Creek project by causing "Rock Creek to suffer an extended span of substantial financial loss during the license term." Pet. App. A-20 to A-21.

[15] *Amici* American Rivers et al. advance a different, result-driven, argument that ignores the terms of the FPA and Congress' intent. They contend that the level of minimum project flows that most promotes fisheries, set either by a state or by the FERC, should apply to FERC projects. Brief of Amici Curiae American Rivers et al. in Support of Petitioner, at 8-9. The American Rivers position fails to balance the need for power with the need to promote fisheries; it would authorize a state to divert water to fish that the FERC would use for power. Such state authority could be used to render impracticable any FERC project, including importantly, all existing FERC-licensed facilities.

The State's interpretation of the FPA would simply shift decisionmaking prerogative from the FERC to the states; yet Congress specifically left the final decision with the FERC in enacting the Electric Consumer Protection Act of 1986, Pub.L. No. 99-495, 100 Stat. 1243, which amended portions of the FPA. Such a shift would not necessarily lead to enhanced fishery protection. The FERC is equally obligated by a host of laws and regulations to protect fishery resources. Such concerns are an integral factor in its decision to regulate minimum flows for fish. The fact that the State is unhappy in this particular instance with the FERC's resolution of such issues is not sufficient reason to upset the entire system of federal regulation.

Thus, the State of California's interpretation of the FPA is cumbersome and unworkable because of the state veto problems recognized by Congress and this Court. In addition, the State's position will not necessarily advance and may well hinder the protection and enhancement of the nation's fishery resources. In short, the State's position is contrary to Congress' intent, reflects bad policy and should be rejected.

C. California Is Simply Seeking To Expand Its Power Under The Public Trust Doctrine.

The State makes no bones about the broad objectives it has in seeking to overturn *First Iowa* in this litigation. Its aims are not confined to low-head hydroelectric projects. The principal objective of the State is to oust the FERC from a meaningful role in the licensing and oversight of all hydroelectric power projects—proposed and existing—and to replace the federal agency with the State Board. Once this power play has been effectuated, the State Board will invoke the public trust as announced by the California Supreme Court in *National Audubon Society v. Superior Court*, 189 Cal. Rptr. 346, 33 Cal. 3d 419, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977 (1983). Relying on the public trust, which arguably reaches every trickle of water in the state and perhaps the snowpack as well, the State Board means to rewrite FERC licenses to its own taste, without regard to bond obligations, federal recapture rights, or FERC orders designed to implement a comprehensive plan for the development of federal waterways.[16] This is not even a "dual" system of control—water cannot be released at 100 cfs and at 175 cfs at the same time. A single authority must decide how much water goes to fish, how much to power and other uses. The State of California claims that authority in this case, but Congress and this Court lodged the power in the FERC, where it should remain.

VII.

CONCLUSION

The Ninth Circuit's decision below should be affirmed and the relief sought by California in this case should be denied.

FEBRUARY 1990.

Respectfully submitted,

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[16]The *amici* States candidly admit their desire to rewrite FERC licenses to suit their tastes. For example, the State of Idaho would like retroactively to subordinate all hydropower water use in favor of "future upstream uses." Brief of Amici States in Support of Petitioner, at 26-27.

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No. 89-333 (18)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AMERICAN PAPER INSTITUTE, NATIONAL HYDROPOWER ASSOCIATION, PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, AND PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Edison Electric Institute ("EEI"), American Public Power Association ("APPA"), National Rural Electric Cooperative Association ("NRECA"), American Paper Institute ("API"), National Hydropower Association ("NHA"), Public Utility District No. 1 of Chelan County, Washington, Public Utility District No. 1 of Douglas County, Washington and Public Utility District No. 2 of Grant County, Washington ("Industry Amici"), submit this brief *amici curiae* in support of respondents Federal Energy Regulatory Commission ("Commission") and Rock Creek Limited Partnership ("Rock Creek").[1]

EEI, APPA and NRECA are the national trade associations of the investor-owned, publicly owned, and cooperatively owned segments, respectively, of the Nation's electric utility industry. Their members hold a large majority of the more than 1000 hydroelectric project licenses issued by the Commission in 48 states. API is the national trade association for the pulp, paper, and paperboard manufacturers of the United States and a number of its members hold hydroelectric project licenses. NHA's members include owners and developers of hydroelectric projects from all regions of the Nation and all segments of the industry, as well as equipment manufacturers and engineering, legal, financial and consulting firms. The public utility districts are municipal corporations of the State of Washington providing electric service to the public and holding Commission licenses for their hydroelectric projects.

The importance to the Nation's energy base of the power generated by the projects licensed and to be licensed in the future has been recently detailed by the

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[1] The letters from the Solicitor General, Rock Creek, and the State of California consenting to the filing of this brief have been filed with the Clerk of the Court.

Commission.[2] As both current and potential licensees, Industry Amici have a vital interest in the issue before the Court.

INTRODUCTION

In the Federal Water Power Act of 1920 [3] Congress ended several decades of piecemeal hydroelectric power development on federal lands and water subject to federal jurisdiction by vesting in the Federal Power Commission (now the Federal Energy Regulatory Commission, both hereafter "Commission") the exclusive authority to license projects which it determined were "best adapted to a comprehensive scheme for improvement and utilization" of a river basin for navigation, water power development and other beneficial public uses.[4] In response to concerns expressed primarily by the western states, Congress expressly disclaimed in section 27 any intent "to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein".[5] In section 9(b) it also directed license applicants to present to the Commission "satisfactory evidence [of compliance] with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes. . .".[6]

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[2] FERC, *Water Power-Use of Renewable Resources* (May 1988); FERC, *Hydroelectric Power Resources of the United States—Developed and Undeveloped* (GPO, 1988).

[3] 41 Stat. 1063, later incorporated into the Federal Power Act in 1935, 49 Stat. 838, 16 U.S.C. §§ 791 *et seq.*, hereafter sometimes the "Water Power Act" or "the Act".

[4] 41 Stat. 1068 (§ 10(a)).

[5] *Id.* at 1077, 16 U.S.C. § 821.

[6] *Id.* at 1068, 16 U.S.C. § 802(b).

This Court first interpreted these two provisions in 1946 in a controversy involving the refusal of the Commission, consistent with its previous administrative construction of those sections,[7] to issue a license to an applicant who had failed to obtain a permit from the State of Iowa to divert water for the same project. In *First Iowa Hydroelectric Coop. v. FPC*, 328 U.S. 152 ("*First Iowa*"), the Court held that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181. In reaching that decision it rejected Iowa's contention that section 27 required a contrary result. *Id.* at 175-76.

For 44 years judicial decisions, including many by this Court,[8] have recognized the continuing validity of *First Iowa's* holding that the Act occupied the field and superseded state laws that purport to control the acquisition of water rights for, and the operations of hydroelectric power projects licensed under the Act. In the present case, California and its supporting states ("Amici States") seek to overturn *First Iowa's* longstanding interpretation of section 27. They rely solely on this Court's interpretation of the similar, but significantly different, language of section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§ 372, 378) in *California v. United States*, 438 U.S. 645 (1978) ("*California*"). For the reasons detailed below, Industry Amici contend that (1) *First Iowa* was rightly decided, (2) it

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[7] Calif. Br. 35, n. 17.

[8] *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *FPC v. Oregon*, 349 U.S. 435 (1955); *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958); *Sperry v. Florida*, 373 U.S. 379, 385 n. 4 (1963); *FPC v. Union Elec. Co.*, 381 U.S. 90, 98-99 (1965); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n. 6 (1982); *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 223 n. 34 (1983); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984).

was properly applied by the Ninth Circuit in this case, (3) *California* does not require a different result, and (4) the Ninth Circuit can also be sustained on an independent legal ground not decided below.

SUMMARY OF ARGUMENT

First Iowa correctly interpreted (1) the Federal Water Power Act as occupying the field of hydroelectric power development and (2) section 27 of that Act as protecting all water *rights*, including those for power generation, vested under state law and preserving all preexisting state *laws* relating to the allocation and use of water for other than hydroelectric power generation purposes, primarily irrigation, municipal and other similar consumptive uses. The Ninth Circuit properly applied *First Iowa* in rejecting California's attempt to impose flow conditions on Rock Creek's use of water for its Commission-licensed project.

Even if section 27 were construed as preserving state laws relating to hydroelectric power development so as to require a "conflict preemption" analysis on a case-by-case basis for over 1000 Commission-licensed projects, the Ninth Circuit's finding of an irreconcilable conflict between California's proposed flow conditions and the Commission-imposed conditions in the Rock Creek license should be affirmed.

Finally, the Ninth Circuit can also be affirmed on the independent legal ground that since the Rock Creek project is located on federal lands withdrawn by section 24 of the Act (16 U.S.C. § 818) for power generation purposes, state law is inapplicable and Rock Creek may utilize the federally reserved water right created by that withdrawal.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY FOLLOWED *FIRST IOWA'S* HOLDING THAT THE FEDERAL WATER POWER ACT EFFECTED AN OCCUPATION OF THE FIELD WITH RESPECT TO THE LICENSING AND CONTROL OF HYDROELECTRIC POWER DEVELOPMENT.

A. The Scope of the *First Iowa* Decision.

There is no dispute that *First Iowa* decided that the Act vested the Commission with *exclusive* licensing authority for hydroelectric projects within its jurisdiction. California's claim is that it nevertheless retains concurrent regulatory authority over a licensee with respect to the use of water in the licensed project operations, in this case the maintenance of minimum flows for fish protection. Furthermore, it contends that state requirements, even though inconsistent with Commission-established license conditions, must be honored unless they are in conflict with "clear congressional directives" in the Act. Calif. Br. 5. The basis for California's claim is section 27, *First Iowa's* interpretation of which California contends should be (1) noncontrolling because it was allegedly dictum and (2) overturned because it is allegedly wrong.

California's claim is erroneous on both counts. *First Iowa's* interpretation of section 27 was plainly necessary to sustain the Court's decision that the Act, when construed as a whole, conferred exclusive licensing authority on the Commission and left no room for the exercise of duplicative state regulatory authority, *i.e.*, that Congress intended to occupy the field of hydroelectric project licensing and regulation. The Court recognized, however, that the "savings" provisions of section 27 limited the Act's superseding effect and therefore required interpretation. Given California's vigorous argument that such an approach is the proper statutory analysis (Calif. Br. 11-12), its characterization of the *First Iowa* interpretation as "dictum" is, at the least, difficult to fathom.

In concluding that section 27 did not preserve from supersedure state laws relating to the use of water for hydroelectric power development purposes *First Iowa* read its scope as follows:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "*other uses.*" Those words, however, *are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.*
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> • • • •
>
> This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the states, *Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.*

328 U.S. at 175-76 (emphasis added). Not only is that interpretation consistent with the comprehensive federal regulatory regime established by the Act and its detailed licensing provisions, but it is fully consistent with the Act's legislative history which, contrary to California's representations (Calif. Br. 39), was thoroughly considered by the Court.[9]

Despite citations to numerous excerpts from the legislative record of the Act from 1914-1920 (Calif. Br. 22-35), California offers no explanation as to why section 27, either in any of its early forms or as finally enacted,

[9] See Brief of Amici Modesto Irrigation District and Turlock Irrigation District.

failed to specify power generation as one of the water uses whose control under state authority was to be preserved from supersedure. Indeed, Rep. Mondell (Wyo.), who had authored section 8 of the Reclamation Act of 1902, recognized section 27's limited applicability:

> The only trouble about this provision is that it is not complete enough and far-reaching enough, and I shall offer an amendment to broaden its provisions. It is not as good a provision as that contained in the irrigation [Reclamation] law, which, by the way, I had the honor of drawing. It is not as broad and all-embracing a provision, but with a slight amendment, *including the word 'power,'* it will do very well.

51 Cong. Rec. 14070 (1914) (emphasis added). No such amendment was ever made, an omission that is particularly significant in light of the overriding focus of the Act on hydroelectric power production. Thus, California's assertion that "[o]n its face, section 27 plainly requires hydropower projects to comply with state water laws" (Calif. Br. 10) is plainly erroneous. State laws relating to power generation are only mentioned in section 9(b), but California does not ask the Court to overrule *First Iowa's* interpretation of the limited "informational" function served by that section.

Section 27 plainly speaks in the disjunctive, preserving both certain existing state *laws* in its first clause as well as certain "vested *rights*" in its second clause.[10] The latter clause was intended to protect *any* state created, preexisting vested water *rights*, including water rights for the generation of hydroelectric power, as this Court held in *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954). Our disagreement with California centers on

[10] "Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with [1] the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or [2] any vested right acquired therein." (Numbers added).

the kinds of state *laws* whose continued applicability was preserved by the first clause of section 27.[11] We do not disagree with the *First Iowa* conclusion that the kinds of state laws preserved by that clause are those conferring rights of a "proprietary" nature.[12] But California's contention that it encompassed *all* state laws relating to any kind of water use, including hydroelectric power generation, *i.e.*, that Congress intended for the Commission to regulate all aspects of licensing hydroelectric projects except for the use of water to run the projects, would mean that Congress labored mightily for six years to craft "comprehensive" licensing authority only to produce a toothless tiger.

1. *Consumptive Uses.*

The laws which Congress intended to preserve by section 27 were primarily those under which "consumptive use" rights could be acquired, *i.e.*, the consumption of water for such purposes as irrigation or municipal needs. Rep. Taylor (Colo.), author of the language ultimately enacted as section 27 (Calif. Br. 28), emphasized that the bill was designed to enable the Commission to grant "authority to create power *and utilize water* for power purposes", but that "if a party appropriates water . . . for *irrigation* under State law they will have that addi-

[11] *First Iowa's* discussion of section 27 (*supra* p. 6) is not without some ambiguity. For example, although the section speaks disjunctively of "laws" or "rights", the Court's language blurs that important distinction. The "rights" protected by the second clause do not appear to be tied only to the "laws" preserved in the first clause, which would arguably be the case if the second clause referred to "vested rights *thereunder*", as section 8 of the Reclamation Act does. See *infra* p. 20. Rather section 27 refers to "vested rights *therein*", which does not grammatically relate to "laws" in the first clause, but more appropriately to "water".

[12] Proprietary rights to the use of water for beneficial purposes, including hydroelectric power generation, are established by general property law or (in most of the western states and, more recently, eastern states as well) by regulatory permit systems. Ausness, *Water Rights Legislation in the East, a Program for Reform*, 24 Wm. & Mary L. Rev. 547 (1983).

tional *property right* in addition to the power privilege granted here." [13]

The recognition in *First Iowa* that the "other uses" in section 27 meant "uses of the same nature" (*supra* page 6) and did not include power generation is supported not only by its omission from section 27 as a specific illustrative use (as decried by Rep. Mondell, *supra* page 7), but by its special treatment under western water law at the time. Although power generation was then recognized as a beneficial use of water in most western states,[14] it was clearly not a "consumptive" use in the sense that it does not physically consume water, as irrigation and municipal uses do. Rather, water used for hydroelectric power generation simply flows through a generating plant's turbines and becomes available for other uses downstream. Consequently, it was generally treated differently than consumptive uses. This is illustrated by the Colorado River Compact of 1922,[15] negotiated only two years later, in which the representatives of the seven Colorado River Basin states (Arizona, California, Nevada, Utah, Colorado, New Mexico and Wyoming)[16] allocated the waters of that basin on the basis of "beneficial consumptive use". Art. III(a) and (b). The Compact also provided that the use of the waters of the basin for navigation would be subservient to their use for "domestic, agricultural and power pur-

[13] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 92 (1918) (emphasis added). Rep. Taylor later claimed credit for "getting section 27 put into this bill, which is the savings clause of our *irrigation* right." 56 Cong. Rec. 9115 (1918) (emphasis added).

[14] 1 Wiel, *Water Rights in the Western States* 410 (3rd ed. 1911).

[15] Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams*, H.R. Doc. No. 319, 90th Cong., 2d Sess. 53 (1968).

[16] The representatives of several of these states were instrumental in adding section 27 to the Act, *e.g.*, Reps. Mondell (Wyo.), Taylor (Colo.) and Raker (Calif.). Calif. Br. 23-35.

poses" and that within those three categories agricultural and domestic uses were to be "dominant". Art. IV. Domestic use was defined to "include the use of water for household, stock, *municipal*, mining, milling, industrial, and other like purposes, *but shall exclude the generation of electrical power.*" Art. II(h) (emphasis added).

Congress thus drew a line in the first clause of section 27 between state laws relating to traditional consumptive uses, which were "saved" from preemption, and state laws regulating the use of water by hydroelectric power projects within the Commission's jurisdiction,[17] which were to be wholly superseded.[18]

Amici States express concern that the Commission allegedly has sometimes exercised its exclusive authority to license projects for hydroelectric generation in a manner

[17] There is no indication that Congress intended to supersede state laws relating to the use of water for (1) steam electric generation, *FPC v. Union Elec. Co.*, 381 U.S. 90, 109-110 (1965), or (2) hydroelectric generating plants using waters not subject to Congress' commerce power.

[18] In *Udall v. FPC*, 387 U.S. 428 (1967), this Court, speaking through Justice Douglas, an ardent champion of "states rights" in the water field, suggested that "[a] *license* under the Act *empowers the licensee* to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, *in effect, to appropriate water resources from the public domain.*" *Id.* at 450 (emphasis added). Similarly, in *Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78 (D.C. Cir. 1983), the court stated that "it is plain that when FERC grants a license without appropriate reservation, FERC *does* undertake not to license other projects that will substantially alter the supply of water to the prior licensee without its consent." *Id.* at 87, n. 19 (emphasis in original). The lack of clear judicial explication of a licensee's source of water use authority probably explains in part why most licensees have continued to seek state water permits in order to protect themselves, at least where they were available without conditions in conflict with their license. Such action at least serves as notice to the state that the licensee has federal authorization to use water for the purposes and in the manner specified in its license, thus aiding the state in the administration of other water rights on the stream.

which they say intrudes on the rights saved to the states by the first clause of section 27 with respect to consumptive uses of water. States' Br. 25-27. Although the issue of whether the Commission has exceeded its jurisdiction is not before the Court, Congress obviously intended that the Commission and the states would confine their regulatory actions to their respective jurisdictional spheres with due regard to the line Congress drew between them. Industry Amici are not aware that the Commission has attempted directly to allocate water for consumptive use purposes, although it has issued a license requiring the applicant to accept minimum flow conditions that could ultimately curtail the licensee's irrigation water rights acquired under California law, an exercise of licensing "leverage" that was sustained in *California v. FPC*, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965).

2. *Instream Values.*

Similarly, in 1920 state law, particularly in the western states whose spokesmen championed section 27, did not provide mechanisms for the acquisition of "proprietary" rights to the use of water for instream values such as fish and wildlife, recreation and aesthetics, nor did the states exercise "regulatory" authority for such purposes.[19] As late as 1973, the National Water Commission highlighted the historic deficiencies of state law in this area as follows: [20]

[19] There is no mention of such uses in Wiel, n.14 *supra*, the classic text on western water law systems at the time. See Shupe, *Keeping the Waters Flowing: Stream Flow Protection Programs, Strategies and Issues in the West* in MacDonnell, Rice and Shupe, *Instream Flow Protection in the West*, Ch. 1 (Univ. of Colo. 1989) for a history of state action in the field.

[20] National Water Commission, *Water Policies For The Future* 271 (GPO 1973). National environmental organizations, including some who support California in this case, believe that many states still do not provide appropriate legal recognition for such values and are currently urging Congress to either (1) remain silent with respect to water rights for designated wilderness areas with

> State laws creating and protecting rights to the use and enjoyment of water fail to give adequate recognition to social (that is, noneconomic) values in water. This omission derives in the West from the law of appropriation, which embodied the social preference during the period of its formulation for economic development over protection of such social values as esthetics, recreation, and fish and wildlife propagation. In the East, where the law of riparian rights prevails, some greater protection of these values is possible since riparian landowners are entitled to a reasonable streamflow in competition with those who would divert the stream to economic uses. But even in the East, the protection of social values lies in the hands of private citizens and not with public authorities, for riparian rights are private rights, not public rights.

Consequently, whatever authority the states possessed with respect to the creation of property rights to the consumptive use of water in 1920, and which was preserved by section 27, cannot be expanded to encompass relatively recent state regulation of water rights for fish and other instream values, which is what California seeks here.

Congress filled that gap in 1920 when it authorized and directed the Commission only to license projects that "in the judgment of the Commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water power development, and for *other beneficial public uses*" [21], uses in which this Court has observed "the Federal Government had a legitimate interest [and] which, while un-

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the hope that the courts will "imply" a federal reserved water right for such areas, or (2) expressly reserve unappropriated water for such purposes. *See e.g., Hearings before the Subcommittee on Public Lands of the House Commitee on Interior and Insular Affairs on H.R. 34 and H.R. 4233*, 99th Cong., 2d Sess. 111-16, 339-49 (1986) (Sierra Club); *Hearings before the Subcommittee on Public Lands, Nat'l Parks and Forests of the Senate Energy and Natural Resources Committee on S. 371*, 101st Cong., 1st Sess. 90-103 (1989) (Wilderness Society).

[21] 41 Stat. 1068 (§ 10(a)) (emphasis added).

regulated, might well be contradictory rather than harmonious." [22] This mandate for "comprehensive" utilization of water for beneficial purposes has proven broad enough to cover instream values impacted by hydroelectric projects, and the Commission has exercised its licensing authority to balance the uses of the land and water resources of a river basin affected by such projects with other beneficial public uses of those same resources.[23] The Commission was actively using its license conditioning power to protect and promote fish habitat and other instream values no later than the 1940's.[24] Nor did the Commission hesitate, well before Congress created the Wild and Scenic Rivers System in 1968 (16 U.S.C. §§ 1271 *et seq.*), to decline to license otherwise economically feasible projects that threatened the environmental and recreational values of a river. *See Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954).

In summary, it is clear that the Commission has steadily become more aggressive in exercising its licensing authority to protect instream values and that, whatever the scope of state law preserved by section 27 may be with respect to conditioning consumptive use water rights to protect or promote instream values, Congress left no room for the imposition of such duplicative or conflicting

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[22] *FPC v. Union Elec. Co.*, 381 U.S. 90, 98 (1965). Although the Court also included irrigation and flood control in its comment, Industry Amici do not believe that Congress intended to vest licensing authority over irrigation uses in the Commission.

[23] In *Udall v. FPC*, 387 U.S. 428 (1967), this Court held that the Commission had a duty to explore "all issues relevant to the 'public interest', including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife". *Id.* at 450. *See also Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[24] *See, e.g., Southern California Edison Co.*, 8 F.P.C. 364, 373 (1949), and *Oakdale Irrigation District, et al.*, 10 F.P.C. 810, 814 (1951), involving projects in California.

conditions on the operation of licensed hydropower projects.

California suggests that *First Iowa* should be confined to pre-licensing situations and that section 27 intended state law to become effective after a license was issued and thereafter control the licensee's operations. Calif. Br. 42-43. This incredible suggestion has absolutely no basis in the Act, its legislative history, or the *First Iowa* decision. Indeed, it is difficult to imagine anything more in conflict with the fundamental purpose of the Act. It is inconceivable that Congress intended to permit a state, *after* the Commission has performed its required balancing functions (usually with state agency participation in comments and adjudicatory proceedings) and structured a license designed to carry out its determination as to the best comprehensive development of the affected resources, to impose water use restrictions on the operating of a project which could wholly alter, if not destroy, the economic feasibility of the project licensed by the Commission. Such a result would make a mockery of the exclusive licensing authority which Congress vested in the Commission. *First Iowa's* holding as to the exclusive authority of the Commission under the Act obviously must extend not only to the licensing of such projects but to their subsequent operation. The authority to impose appropriate conditions in a license is at the heart of the Act's regulatory scheme and must rest exclusively with the Commission if it is to be exercised effectively.[25]

Where Congress has considered it appropriate in certain special situations to allow an inroad on the Commission's exclusive licensing authority by other agencies,[26] such authority must be exercised either prior to the issuance of the license or project construction. California asks the Court to infer that Congress similarly authorized it to impose water use conditions on any water right permits issued to a licensee. But under California's "public trust doctrine" (page 19 *infra*) its conditioning authority might not stop at the licensing or construction stage and California would presumably claim the right to revisit any permit conditions during the term of the license. Such a power would be flatly inconsistent with one of the dominant purposes of the Act to provide assurance to developers that the terms and conditions of their licenses would not be changed without their concurrence. See *supra* pages 18-19.

Congress did not expressly provide such a concurrent conditioning role for the states, with all the possibilities that would pose for a state to frustrate or unduly burden the operations of those projects the Commission had found "best adapted" to develop the power and other "beneficial public uses" of a river basin, and the Court should not imply one from section 27.[27] Indeed, although Congress recently substantially enhanced the *advisory* role of the states with respect to license conditions affecting fish and wildlife, instream flows, and other environmental values in the Electric Consumers Protection Act of 1986 ("ECPA"),[28] it did so without adopting proposals of a western states' group that would have overturned *First Iowa* and granted the states dominant authority with respect to such conditions.[29] Consequently,

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[25] Similarly, California contends that the power to condition its water use permits is central to the effective exercise of its retained regulatory authority over water rights. Calif. Br. 46.

[26] *See* Brief of the Amici Council of State Governments, *et al.* at 24-25.

[27] In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), where the special conditioning authority of federal land management agencies under section 4(e) of the Act (16 U.S.C. § 797(e)) was recognized, the Court rejected the claim of the Indian Tribes that they should have the right to veto a proposed project by refusing to permit the use of their lands. *Id.* at 787. If Congress did not confer a veto power on Indian Tribes, to whom it owes a special fiduciary obligation as trustee, surely it did not intend to confer one on the states.

[28] 100 Stat. 1243, codified in scattered sections of 16 U.S.C.

[29] On April 17, 1986, during Senate consideration of ECPA, a resolution of the Western States Water Council ("WSWC") con-

reenactment of a major portion of the Act under those circumstances should be viewed as ratification of the *First Iowa* decision.[30] *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419-20 (1986).

B. Permitting States to Impose Minimum Flow or Other Water Use Conditions on Licensees Would Frustrate Two of the Fundamental Objectives of the Act.

A principal objective of the Act was to achieve "comprehensive" development of the water resources of a river basin for navigation, water power development, recreation and other beneficial uses. In the context of the times, Congress was attempting to overcome two principal obstacles. First, only a federal agency with broad, exclusive authority to consider and balance all of the interests associated with the *federal* land and navigable waters, which were the jurisdictional bases for the Act,

taining suggested "states' rights" amendments was inserted in the Congressional Record, but no amendments were offered upon agreement that the Senate Energy Committee would schedule a hearing on them. See 132 Cong. Rec. S4448-49 (daily ed.). A hearing was held on September 12, 1986. *Hearings on Hydroelectric Project Licensing/State Water Law Before the Senate Committee on Energy and Natural Resources*, 99th Cong., 2d Sess. (1986). The Executive Director of the WSWC testified and submitted proposed amendments which would have, *inter alia*, prohibited the Commission from (1) issuing any order with respect to a project unless the applicant had proven the acquisition of any rights necessary under state law to use water and (2) imposing license conditions inconsistent with water use conditions established under state law. *Id.* at 27-28.

The subsequent conference report of September 30, 1986 on the bill stated that it "does not change FERC's present responsibility to resolve competing demands in the public interest." H. Rep. No. 934, 99th Cong., 2d Sess. 25 (1986). ECPA became law on October 16, 1986, with none of the proposed WSWC amendments.

[30] The "savings clause" contained in section 17 of ECPA (100 Stat. 1259) and relied on by the Amici States to counter this ratification argument (States' Br. 18, n. 13) simply maintained the status quo with respect to existing federal-state jurisdiction over water rights, wherever *First Iowa* had already established it.

could accomplish that task. Individual states lacked authority to do so with respect to such federal interests, even with their own borders.

Second, interstate river basins presented an even more serious obstacle, since each basin state lacked authority to exercise comprehensive regulatory authority over resources located in another state absent an interstate compact creating an interstate agency with power to do so.[31] Thus, while optimum development of the hydroelectric resources of an interstate basin might dictate a single high dam at a particular location in that basin, the parochial interests of the individual states might lead to each state licensing one or more smaller dams in its own jurisdiction. Similarly, where a project spans an interstate boundary river, or is located just upstream of the point where a river crosses into another state or country, or dedicates all of its power for use in another state or states, in the absence of the Commission's comprehensive and exclusive licensing authority, a state could impose conditions on project operations designed solely to foster its own interests.

Centralizing the exclusive licensing authority in the Commission solved the foregoing two problems, but California's attempt to assert control over the conditions of water use by licensees would resurrect them both. If a particular flow standard is set for waters affecting fed-

[31] *First Iowa* emphasized the testimony of Secretary of Agriculture Houston that "[t]he problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies". 328 U.S. at 181, n. 23.

Industry Amici are aware of only two situations in which Congress has subordinated the comprehensive hydropower planning and licensing authority of the Commission to the States. In approving the Delaware and Susquehanna River Basin compacts, Congress provided that the Commission's licensing decisions "shall not substantially conflict" with the comprehensive plans of the compact agencies unless the President finds that the "national interest so requires." *See* Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 Nat. Res. Law. 153, 160-63 (1973).

eral Indian or other reservations under section 4(e), for example, under California's view the state conditions would nevertheless control. Similarly, the problems with California's proposal become even more pronounced in interstate river basins, where many licensed projects are located.[32] If the Commission determines that a certain flow is essential throughout a particular reach of an interstate river, it can implement that decision on an interstate basis as it licenses individual projects, in whatever state they are located. But if the California position were to become the law, each state could implement its water permit system to set its own flow requirements in disregard of the policies of its neighbor states.

A second major purpose of the Act was to provide the security of tenure for the use of federal lands and navigable waters essential to finance the projects needed for development of the Nation's hydropower resources. At the turn of the century, the right to occupy federal lands for the construction of a project was granted by either the Secretary of Agriculture or the Secretary of the Interior by annual special use permits revocable at will. This uncertain tenure situation was obviously inadequate to promote the necessary investment in hydroelectric projects. Against that background, the industry and the Executive Branch sought and obtained in the Act the opportunity to obtain licenses for up to 50 years, which was deemed adequate for necessary project financing.[33]

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[32] FERC, *Hydroelectric Power Resources of the United States—Developed and Undeveloped*, table 2 (GPO, 1988). The operations of over 100 hydroelectric projects, many in the interstate and international Columbia River Basin, are coordinated under the Pacific Northwest Coordination Agreement and Commission-imposed license conditions. *See* Brief of Amici Pacific Northwest Utilities.

[33] *See, e.g.*, the testimony of O. C. Merrill, principal Administration spokesman on the legislation:

> As to the present law, its chief lack and I do not intend to discuss it further, is the insecurity of tenure. I have not heard a man in the Government service or out defend that feature of the law. The one thing that is vital in new water-power legislation is the granting of a tenure under which investment can be protected. We could stop there and still do business under the present procedure of the departments.

Hearings before the House Committee on Public Lands on H.R. 14893, 63rd Cong., 2d Sess. 412 (1914). The result of this effort was section 6 of the Act, which provided for up to 50 year license terms and that all terms and conditions were to be expressed in the license, subject to alteration only upon notice and agreement. 16 U.S.C. § 799. *See Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983).

That vital security of tenure could be wholly undercut by California's proposed interpretation of section 27 to permit states to impose a variety of water use conditions on the operation of a project *after* it is licensed. Nowhere is this result better illustrated than in California, where the recent application of the "public trust" doctrine to vested appropriate water rights threatens to undermine, if not obliterate the security of tenure and investment which has long been the hallmark of the prior appropriation system of water rights.[34] In *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419, 658 P.2d 709 (1983), the California Supreme Court held that water permits granted by the State Water Resources Control Board are subject to the public trust doctrine and that the Board has the power and the duty to reconsider previous water allocations and associated conditions at any time. To permit California to wield such a regulatory Sword of Damocles over existing and prospective licensees could jeopardize existing investments and would plainly discourage future hydroelectric development (which may well be the undisclosed agenda of California and its environmental amici in this case.).

C. *California v. United States* Does Not Compel Reinterpretation of Section 27 to Preserve State Laws Governing the Use of Water for Hydroelectric Power Generation.

California contends that the interpretation of section 8 of the Reclamation Act of 1902 in *California* compels

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[34] *See, e.g.*, Gould, *The Public Trust Doctrine and Water Rights*, 34 Rocky Mt. Min. Law. Inst. 25-1 (1988).

a reinterpretation of section 27 to expand the kinds of laws *First Iowa* held it saved from supersedure. California's only justification for overturning a holding that has been applied in numerous judicial decisions, relied on by the Commission and the hydroelectric industry, and acquiesced in by Congress since then, indeed "ratified" by Congress in enacting ECPA in 1986 (*supra* pages 15-16), is that the language of the two sections is "virtually identical" and that there is nothing significantly different in the purposes of the Water Power Act and the Reclamation Act to justify different interpretations. These arguments are fallacious.

Section 27, although patterned after section 8, is *not* "virtually identical" to that section but embodies significant modifications of the earlier language. Section 27 provides:

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

In contrast, section 8 read as follows at the time section 27 was adopted (32 Stat. 390, bracketed numbers added):

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, [1] and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, [2] and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: [3] Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Obviously a major portion of section 8 was not carried over into section 27, which is undoubtedly why Rep. Mondell, the author of section 8, described section 27 only as "somewhat similar" to section 8. Calif. Br. 24.

The reasons for the numbered deletions from section 8 in adapting it to the different purposes of the Water Power Act can reasonably be inferred. In inverse order, clause 3 plainly was inappropriate because it focused on the Reclamation Act's primary goal of securing the consumptive use of water for irrigation, a subject not touched in the 1920 legislation. Rather, that latter Act established a new and pervasive federal regulatory regime primarily concerned with the use of water for hydroelectric power generation, with due regard for other competing interests.

Clause 2 was an attempt to maintain the status quo with respect to the respective jurisdictional authorities and proprietary rights of the federal government and the states in interstate streams, as well as to protect private use rights in such streams. This clause would have been inappropriate in section 27 because the whole thrust of the Act was to supersede state laws concerning the use of water for hydroelectric power generation, as well as other laws largely of a regulatory nature that relate to non-consumptive use of water affected by a licensed project.

Finally, the reason why clause 1 of section 8 was not carried over into section 27 so as to require either the Commission or its licensees "to proceed in conformity with" the state laws "saved" from supersedure under that section is obvious from the Act's broad purposes to promote the national development of hydropower. First, nothing in the Act purported to require a Commission license for the use of water for consumptive uses, so there was obviously no reason to direct compliance with such laws. Second, since there was no intent to preserve existing state authority over the use of water for hydroelectric power generation, there would be no applicable state laws for the licensee to comply with. Congress was

aware of the potential for duplicative state laws to frustrate or unduly burden the operations of those projects the Commission found "best adapted" to develop the hydropower and related resources and wisely precluded that possibility.

The foregoing reasons for the needed modification of section 8 highlight some of the basic differences in the two statutes. The Reclamation Act was designed for the development and consumptive use of water for relatively large scale irrigation projects. It was enacted against a backdrop of half a century of relatively small scale individual irrigation enterprise in the West under the innovative prior appropriation doctrine, with little involvement of the federal government other than to sanction local water laws and customs. *California*, 438 U.S. at 655-63. Western Congressmen and their farmer constituents, while eager to receive the federal investment in reclamation projects which would "make the desert bloom", were reluctant to do so at the price of the federal government overriding the basic elements of western water law that had provided the security of tenure in limited water supplies so essential in the arid West. Consequently, it is understandable why they fought to preserve those laws and directed the Secretary of the Interior to "proceed in conformity" with them in carrying out the new federal program.

The Federal Water Power Act was enacted against a wholly different backdrop. Hydroelectric power generation was a relatively recent development at the time the great debate began in 1914 over federal encouragement and regulation of that activity. Moreover, the federal government was already heavily involved in that development in that many projects were either located on federal land and required an occupancy permit from either the Secretaries of the Interior or Agriculture, or else involved navigable waters, thus requiring authorization from the Secretary of War and concurrent federal legislation. Hence, the centralization of the already dominant federal authority into the Federal Power Commission did

not produce the same degree of apprehension among western Congressmen that the Reclamation Act had, particularly since the federally licensed hydroelectric power generating activity would not involve the consumptive use of water. Consequently, the western Congressmen, despite all their rhetoric, obviously concluded that it was sufficient to preserve only existing state laws governing the consumptive use of water and all vested water rights.[35]

California's procrustean characterization of the scope and significance of the Act *vis a vis* the Reclamation Act (Calif. Br. 16) is patently wrong. It suggests that because reclamation projects are authorized and funded by Congress and operated by federal agencies, they somehow serve "important national goals", whereas licensed hydroelectric projects, which allegedly "are built and operated by private entities for profit purposes, . . . serve more local goals." *Id.* Aside from the questionable philosophy reflected in this argument, *i.e.* that the public interest can only be promoted through the direct involvement of the federal government, and the failure to acknowledge that a great proportion of the outstanding Commission licenses are held by cities, states (including California), other public agencies, irrigation districts and not-for-profit cooperatives, the comparison is woefully in error. Indeed, the hydroelectric project licensing program carried out by the Commission, which has licensed over 1000 projects in 48 states and has applications pending for many more, is far more a "national" program than the Reclamation Act, which, while having national benefits, is a predominantly "regional" program of some several hundred reclamation projects confined to the 17 western public land states.[36]

Furthermore, while there are many small licensed projects which make their own contribution to the national

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[35] *See* Brief of Amici Pacific Gas and Electric Company, *et al*, pt. II.

[36] U.S. Dep't of the Interior, Bureau of Reclamation, *1987 Summary Statistics*, Vol. 1 at 1 (1987).

interest,[37] such as Rock Creek's which California cites as an example of the allegedly "local" interests promoted by hydropower development, there are also many large licensed projects across the Nation.[38] Finally, although reclamation projects have matured from essentially local, single purpose irrigation projects to larger scale, multiple purpose projects, most remain discrete, totally intrastate, isolated projects with a dominant local irrigation purpose.[39] On the other hand, licensed hydroprojects, regardless of size, are usually interconnected to large regional,

[37] In the National Energy Act and the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§ 2601 *et seq.*), Congress enacted a comprehensive set of policies to encourage, among other goals, development of cogeneration and small power production and specifically, the "expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power". *Id.* at § 2601(3). *See* especially Title II, section 201 (*id.* at § 796(3)(17)-(22)) and Title IV.

[38] The largest privately-owned conventional hydropower project currently in operation is Susquehanna Power Company's Conowingo project on the Susquehanna River near Conowinga, Maryland, with 476.6 megawatts of generating capacity. The largest non-Federal publicly-owned conventional project is the Power Authority of the State of New York's Robert Moses project in Niagara Falls, New York, with 1,950 megawatts of capacity.

The largest privately-owned pumped storage project currrently in operation is the 2,100 megawatt Bath County project in Virginia owned by Virginia Power and Allegheny Power System. The largest publicly-owned pumped storage project is California Department of Water Resources' and Los Angeles Department of Water & Power's Castaic plant located off the California Aqueduct, with 1,200 megawatts of capacity. FERC, *Water Power—Use of a Renewable Resource* 7, 8 (May 1988).

[39] Indeed, overriding *interstate* problems associated with the Boulder Canyon Project Act of 1928 (43 U.S.C. §§ 617-617t), which not only is a supplement to the reclamation law but contains a "savings" provision similar to section 27 (*id.* at § 617q), led this Court to conclude that state law nevertheless could not limit the Secretary of the Interior's authority to allocate the water from that project, both interstate and intrastate, exclusively by federal contract. *Arizona v. California*, 373 U.S. 546, 585-90 (1963). *California* recognized that that decision turned in part of the project's "multistate scope" and did not disturb it. 438 U.S. at 673-74.

national or international transmission grids to provide power far beyond their generating sources.

D. Confirming the Commission's Exclusive Authority To Establish License Conditions Will Not Create Novel or Insurmountable Problems For State Administration of Water Rights.

California contends that reaffirming *First Iowa's* holding that the Act effected a preemption of state law in the field of regulating hydroelectric projects "would create two bodies of law in the same river—a body of FERC-created law applicable to hydropower projects and a body of state law applicable to all other users—thus causing potentially inconsistent regulation of water rights in the same river". Calif. Br. 44. It further alleges that "the state cannot effectively manage and coordinate water rights unless state laws apply to *all* users, including hydropower projects" (*id.* (emphasis added)) and that the Ninth Circuit decision would "create . . . 'legal confusion' ". *Id.* at 15. This is not true and, with all due respect, borders on the disingenuous. California cannot seriously argue, given the tension in federal-state relations in western water law since this Court's *Pelton Dam* decision in 1955 (*infra* pages 29-30), that a water right derived from federal law rather than state law is a unique, unmanageable concept. Indeed, it was a party to *Arizona v. California*, 373 U.S. 546 (1963), in which any lingering doubts as to the exercise of federally reserved water rights for Indian and other federal reservations were resolved adversely to the states' contentions.

There are several hundred million acres of federal lands throughout California and the other western states which have been reserved by Congress or the Executive Branch for a variety of special purposes and for which the United States claims federal reserved water rights. Most of those federal claims have already been adjudicated or are in the process of being adjudicated in stream adjudications under the broad consent to suit provisions of the 1952 McCarran Amendment, 43 U.S.C. § 666. *See Colorado River Water Cons. District v. United*

States, 424 U.S. 800 (1976); *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971); *United States v. District Court in and for Water Div. No. 5*, 401 U.S. 527 (1971). Under such adjudications the priority, permitted use and quantity of such federal rights are determined by state courts and administered under the resulting decree along with the state water rights on the stream. There is no apparent reason why the similar attributes of any water use by a hydroelectric project under a Commission license could not be similarly adjudicated and administered.

II. EVEN IF *FIRST IOWA* IS REINTERPRETED TO PERMIT NON-CONFLICTING STATE REGULATION OF HYDROELECTRIC POWER DEVELOPMENT, THE NINTH CIRCUIT RESULT MUST STILL BE AFFIRMED.

California concedes that, even if *California* justifies reinterpreting section 27 as broadly as it urges, "'state laws cannot be applied if they conflict with 'clear Congressional directives' ". Calif. Br. 14. It then contends that "states have the right to deny water rights for—in effect, to veto—[licensed] projects that fail to comply with state law, assuming that the state action does not conflict with a clear Congressional directive." *Id.* at 47. In short, even though *First Iowa* held that a state may not veto a hydro project subject to Commission jurisdiction by denying it a "license", California may veto it by denying it a "permit". But whatever label a state may place on the document it would require a project to obtain before it may use water for hydroelectric power generation, if section 27 did not save Iowa's law requiring a duplicative license from supersedure, it does not save California's law requiring a duplicative and conflicting permit. Moreover, if a state may not veto a jurisdictional hydroproject by denying it a license or permit, *a fortiori* it may not accomplish the same result by granting a permit containing burdensome conditions in conflict with the Commission license.

California's apparent assumption that concurrent state regulation is only superseded where it conflicts with "clear congressional directives" is also mistaken. That was the context for the traditional conflict preemption analysis in *California* because the federal reclamation program is implemented pursuant to the Reclamation Act and supplemental statutory authorizations for individual projects. But where a federal regulatory program is implemented through a licensing program, as here, the conflict inquiry extends to whether state law conflicts or is inconsistent with the license, lease, permit, contract, regulations or other indicia of authority issued by the federal agency.[40]

Moreover, it is the height of sophistry for California to suggest that the higher California flow requirements do not "conflict" with the license conditions because they "provide greater protection of the fish resource" and that the licensee "can meet its obligations under both federal and state requirements and is not required to choose between them."[41] Water that is required to bypass a proj-

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[40] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). In *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 n. 3 (9th Cir. 1979), *aff'd* 455 U.S. 947 (1980), the Court concluded that "the conflict in the present case strikes at the heart of the federal regulation [inasmuch as the] Mineral Lands Leasing Act and extensive permit procedures are designed for the very purpose of circumscribing the conditions under which the Government lessee will operate."

[41] Calif. Br. 48-49. The astounding position of the Amici American Rivers, *et al.* would have the federal-state jurisdictional issue resolved on a case-by-case basis, based not on the Supremacy Clause, but on which sovereign requires a licensee to release the most water for fish from a project! Among other things, these Amici apparently do not realize that the lesser of two water release schedules—not the greater—is sometimes the most environmentally desirable. *See e.g., Public Utility Dist. No. 1 of Grant County*, 45 F.E.R.C. ¶ 61,401 (1988), where the Commission approved a settlement agreement which, among other things, provided for a reduction in flows to discourage salmon spawning in areas which may not be covered by water during subsequent low flow periods.

ect's turbine generators for fish flows causes a gallon for gallon reduction in water available for the production of power,[42] and thus effects a change of water use by the project that the Commission had determined, pursuant to the direction to do so in section 10(a) of the Act, was "best adapted to a comprehensive plan for improving or developing a waterway or waterways" for the multiple purposes of the statute. 16 U.S.C. § 803(a). That duty, imposed exclusively on the Commission, is the "clear Congressional directive" California is unable to discover.

In the broader context of the conflict between California's flow conditions and the license conditions imposed by the Commission in its presently pending proceedings, the specific facts are undisputed. Rock Creek's license established interim minimum flow rates of 11 cubic feet per second (cfs) from May through September and 15 cfs from October through April while Rock Creek conducted required studies to provide the basis for Commission establishment of long term minimum flow rates. Rock Creek subsequently applied for and obtained in 1984 a state water permit setting interim flow rates at the same level and for the same duration as established by the Commission in its license. Three years later California unilaterally amended that permit to set long term rates at higher levels and for different durations than the interim rates provided for in the license, *i.e.*, 60 cfs from March through June and 30 cfs from July through February. The Commission subsequently conducted an adjudicatory hearing, in which California participated, on the issue of the appropriate long term minimum flow

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[42] In storage projects state requirements could require lowering reservoir levels below a minimum that the Commission considered appropriate for recreation, or conversely require higher reservoir levels for such recreation purposes even though the Commission had concluded that more reservoir space should remain available for flood control purposes. One of the most serious threats the California position poses is that there is no discernible limit to the mischief that state control of project water use could cause.

rates. On November 16, 1987 an administrative law judge issued a decision recommending long term rates of 20 cfs year round (41 F.E.R.C. ¶¶ 63,019, 65,122 (1987)), which is still pending before the Commission.

Based on the status of proceedings to that point, the Ninth Circuit correctly concluded that California's proposed conditions created an irreconcilable conflict with Rock Creek's license (877 F.2d 743, 749 (1989)):

> Changing the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project. It would, in essence, create a different type of hydropower project from the one described in the license. In effect, this does constitute a veto of the project that was approved and licensed by FERC.

Assuming that the Commission adopts the administrative law judge's recommendation, that direct conflict between the long term license conditions and the California conditions will still exist.

III. THE NINTH CIRCUIT CAN ALSO BE AFFIRMED ON THE ALTERNATIVE, INDEPENDENT GROUND THAT NO STATE LAWS PRESERVED UNDER SECTION 27 HAVE APPLICABILITY WHERE, AS HERE, FEDERALLY "RESERVED" LANDS ARE THE BASIS FOR COMMISSION JURISDICTION.

In *FPC v. Oregon*, 349 U.S. 435 (1955), this Court held that state water laws, regardless of the extent to which they otherwise may have been preserved under section 27 in non-public land states, have no applicability to a project when the basis for Commission jurisdiction rests in whole or part on the proposed location of the project on federal lands which have been "withdrawn" from disposition under the public land laws and "reserved" for power development purposes.

The Rock Creek project is located in part on federal lands managed by the Bureau of Land Management. Un-

der section 24 of the Act "any lands of the United States included in any proposed project . . . *shall* from the date of filing of application therefor be *reserved* from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress." 16 U.S.C. § 818 (emphasis added)). Consequently, that Congressionally mandated automatic reservation, as a matter of federal law and independent of any formal Commission action, impliedly "reserved" sufficient unappropriated water from Rock Creek to satisfy the reasonable requirements of the primary purposes of the reservation, *i.e.*, power production. *United States v. New Mexico*, 438 U.S. 696 (1978). Any license issued in such circumstances also impliedly carries with it the right to utilize such federal reserved water for the operation of the licensed project.[43]

The Ninth Circuit's decision can also be affirmed on this independent ground even though the issue was not decided below, *United States v. Arthur Young & Co.*, 465 U.S. 805, 815 n. 12 (1984), particularly since it appears to be within the scope of the issue on which review was granted, namely the applicability of state water law to the Rock Creek project. The bar against "post hoc rationalization" of an agency decision by agency counsel, *Bowen v. Georgetown Univ. Hosp.*, —— U.S. ——, 109 S.Ct. 468, 473-74 (1988), applies only to policy or judgment decisions entrusted to the agency and not to independent controlling legal grounds for affirmance. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

CONCLUSION

The Ninth Circuit's decision should be affirmed.

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[43] *Compare Skeem v. United States*, 273 Fed. 93 (9th Cir. 1921); Report of Special Master Simon H. Rifkind, p. 266 (December 5, 1960) adopted in *Arizona v. California*, 373 U.S. 546 (1963) (agricultural lessees of Indian lands entitled to a federally reserved water right may utilize such reserved right).

Respectfully submitted,

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No. 89-333

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PACIFIC NORTHWEST UTILITIES AMICUS BRIEF

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PACIFIC NORTHWEST UTILITIES AMICUS BRIEF

INTEREST OF THESE AMICI

This brief is filed on behalf of 9 Pacific Northwest utilities, 7 of which are members of the Public Generating Pool. The Pool, its members, and the other individual utilities are described in Appendix A. All of them are parties to the Pacific Northwest Coordination Agreement (described below at pp. 18-24) and all will be directly affected by the procedures and standards which will govern their future applications for hydroelectric power project licenses and license renewals. They submit this amicus brief in support of the proposition that the hydroelectric power licensing process has been functioning, and should continue to function, in the way in which Congress intended.

SUMMARY OF ARGUMENT

The premise and the conclusion of this brief is that Congress intended, and for good reason, that final authority for determining the conditions of hydroelectric project licenses be vested in the Federal Energy Regulatory Commission ("FERC"). Congress did not intend to give the states veto power over license conditions which FERC has determined to be in the public interest.

The Pacific Northwest provides excellent examples of the importance of coordination in the operation of hydroelectric projects and of the complexity of the process of attaining that coordination. Many different, and often conflicting, interests must be taken into account. Individual Pacific Northwest project licenses illustrate the accommodation of interests as diverse as flood control and navigation, the needs of

nuclear installations, fish and wildlife protection (from both federal and state perspectives), archaeological survey and salvage, recreation, the rights of Indian tribes, the jurisdictional concerns of states and local governments, and federal rights and obligations under the Columbia River Treaty with Canada. Those illustrative licenses make it clear that regulatory constraints unilaterally imposed by individual states would have impacts far beyond the borders of those states.

The Pacific Northwest Coordination Agreement provides mechanisms for coordinating the operation of the entire system within the constraints created to accommodate those many competing interests. As a result, it provides billions of dollars in benefits to the citizens of the Pacific Northwest and California. Individual states are required by their own laws to administer their water resources for the benefit of their own

citizens. The coordinated system could not operate with its present effectiveness if it were hampered by unilaterally-imposed license conditions designed to benefit the local interests of individual states.

Congress never intended that the licensing process be subjected to that kind of strain. Congress provided in the Federal Power Act a comprehensive regulatory scheme in which competing interests are balanced and accommodated under FERC's authority. When it recently amended the Federal Power Act in the Electric Consumers Protection Act of 1986, Congress provided an enlarged role for the states by institutionalizing the role of recommendations made by state regulatory agencies. However, it chose not to disturb the provisions of the Federal Power Act which this Court and others have long interpreted to mean that the states do not have independent power to impose project

license conditions based on regulatory laws.

Federal law provides for meaningful state participation in decisions about hydroelectric power. However, Congress never intended that the final decisions about project licenses be in the hands of the states. Rather, it has assigned to FERC both the responsibility to carry out federal policies and the ultimate authority which is necessary to meet that responsibility.

ARGUMENT

1. The Pacific Northwest Hydroelectric System Is a Complex and Coordinated System.

In the Pacific Northwest more than 100 hydroelectric projects are operated as a coordinated system. For that coordinated system to function effectively it is vital that license conditions for

individual projects be determined at the federal level after all affected interests -- those of the states, the federal government, Canada, and various Indian tribes -- are taken into account. Because the system impacts many different entities with many different interests, there is often conflict over issues such as flood control, irrigation, recreation water levels, power production, international and Indian treaty rights and fisheries. The fisheries issue itself frequently creates conflict between upstream and downstream entities. Those widely disparate interests could not be properly balanced if individual states could dictate conditions like minimum flow requirements for individual projects.

Some examples will illustrate the interrelated nature of the problems which must be addressed during the licensing process.

One excellent example of the importance of coordination under unified authority, because of the many competing interests which had to be accommodated at a single project, is provided by Wells Dam, FERC License No. 2149, issued to Douglas County Public Utility District in 1962.[1]

Wells is one of 11 dams located on the main stem of the Columbia River. The Columbia River has its origins in Canada. The volume of its flow in the Pacific Northwest states depends in part upon the operation of Canadian dams and reservoirs. Wells Dam, located in the state of Washington at river mile 515.8, is 1,120 feet wide, has a reservoir 29.5 miles long, and has 10 generators rated at a total of 820 Mws. The dam and reservoir abut federally-owned lands, tribal lands of the Colville Indian Reservation, and

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[1]Federal Power Commission, Order Issuing License (Major), Project No. 2149, July 12, 1962.

private lands under the jurisdiction of various municipalities and the State of Washington. Immediately upstream are two federal dams (Chief Joseph and Grand Coulee). Immediately downstream are the remaining mid-Columbia dams licensed to members of the Public Generating Pool. Further downstream the Columbia River becomes the boundary between Washington and Oregon where it is spanned by several federally-owned projects. All these dams and reservoirs are coordinated by hydroregulation under the Pacific Northwest Coordination Agreement.

The Wells license requires coordination with other facilities, with utilities in both Washington and Oregon, and with the Bonneville Power Administration which markets federal power in the Pacific Northwest. Under the terms of the license FERC can, if necessary, order that coordination.

The license specifically requires fish passage facilities. The Washington Departments of Fisheries and Game, among others, participated before FERC in developing the details of that requirement. The license also recognizes that the Wells reservoir will encroach upon the tailwaters of the Chief Joseph Dam of the Army Corps of Engineers. It requires Douglas County Public Utility District to reimburse the Corps if that encroachment should interfere with power production at Chief Joseph.

The license addresses many competing interests. Those interests include power production, transmission arrangements, flood control and navigation under the jurisdiction of the Army Corps of Engineers, state and federal agency concerns regarding fish and wildlife, archaeological survey and salvage, recreation, and coordination of the project with the United States Columbia River power system. In addition to the fisheries

interests of the State of Washington, the license addresses the interests of other states in anadromous fish,[2] tribal interests in treaty fishing rights, and federal interests in the anadromous and ocean fisheries.

The license also prescribes, for flood control, how the dam will be operated in conjunction with the federally-owned Dalles Dam downstream, as well as how the dam will use Canadian storage under the Columbia River Treaty (described below at pp. 19-20) for increased streamflow. It requires the licensee to provide power to the BPA federal system for delivery to Canada.

The history of Priest Rapids Dam provides another example of the importance of FERC's authority. The license for

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[2]Salmon and steelhead trout are anadromous fish. In Pacific Northwest rivers they migrate downstream to the Pacific Ocean where they remain two to four years before returning upstream to spawn in the streams where they were hatched.

Priest Rapids, issued in 1955 to the Grant County Public Utility District, provided for minimum flows of 36,000 cubic feet per second (cfs), which had to be coordinated with releases from upstream publicly-owned federal dams (Grand Coulee and Chief Joseph) as well as other upstream mid-Columbia dams such as Wells, Rocky Reach, Rock Island, and Wanapum. When it determined the minimum flows for Priest Rapids, FERC had to balance, along with all of the interests described in the discussion of the Wells license, the need to provide enough water for the cooling facilities at the Hanford nuclear projects at the Hanford Nuclear Reservation immediately downstream.

At Vernita Bar, downstream from Priest Rapids, salmon redds (nests of eggs) were harmed in 1976 during fluctuating flows. The affected state fisheries agencies originally received compensatory fish production from the nuclear project

owners; later they petitioned FERC to amend the Priest Rapids license to increase the minimum flows to 70,000 cfs. With the help of FERC Administrative Law Judges, Grant County Public Utility District and the state fisheries agencies reached several interim agreements to address state minimum flow demands while balancing other competing interests.

Recently the interested parties, under FERC's auspices, reached a landmark long-term settlement agreement. The agreement creates a sliding scale of minimum flows based on how much spawning occurs at various water levels.[3] The ability of Priest Rapids to meet its

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[3]Automatically giving preference to the highest locally-recommended flow requirement (see Brief of Amici Curiae American Rivers et al.) could devastate fish populations elsewhere. Spawning occurs at the edge of a stream in the shallows. The eggs could be exposed and destroyed if the water level was too high during spawning because of high minimum-flow requirements and was later lowered by drought or other conditions.

minimum flow requirements without severe and imprudent reservoir drafts (which would adversely affect power production or recreational facilities) depends on releases from the federal storage projects upstream from Priest Rapids. BPA is a party to this settlement and has agreed to provide releases from the Chief Joseph Dam to enable Priest Rapids to meet the new minimum discharge requirements. In addition, the Chelan County and Douglas County Public Utility Districts provide compensated reservoir draft at their projects to assist Priest Rapids.

The parties involved in this settlement, approved by FERC and conducted under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service,[4] the

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[4]Salmon and steelhead trout may be caught in the Pacific Ocean where they mature before returning to spawn. See footnote 2, supra.

Oregon Department of Fish and Wildlife,[5] BPA, the Chelan, Douglas and Grant Public Utility Districts, and three sovereign Indian Tribes[6] which have treaty fishing rights and are not, by and large, subject to state jurisdiction.

The importance of ultimate federal authority is also illustrated by the situation of Washington Water Power Company ("WWP"). WWP serves its customers, most of whom are in Idaho and Washington, with power generated in large part by projects located in Washington, Idaho and Montana. Two projects -- Noxon Rapids and Cabinet Gorge -- provide the majority of WWP's peak generating capacity. Both are located on the Clark Fork River which flows from Montana into Idaho. The Noxon Rapids Project is located in Montana. Cabinet Gorge straddles the Idaho-Montana

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[5]Many of these fish are spawned and caught on the Oregon side of the Columbia River.

[6]The Yakima, Umatilla and Colville tribes.

border.[7] WWP serves less than 20 retail customers in Montana, most of whom are company employees who work at the dam sites.

In this setting it is clear that a regulatory constraint imposed by the State of Montana could significantly impact most of WWP's retail electric customers who reside in other states. Those impacts would be felt in the states of Idaho, Washington, and Oregon. They would also be felt in Canada.[8]

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[7]Ninety-nine percent of the reservoir is in Montana, while the dam and powerhouse are in Idaho.

[8]From the Noxon Rapids Project in Montana, the Clark Fork River flows to the Cabinet Gorge Project which straddles the Idaho/Montana border. From there, the Clark Fork River flows into Lake Pend Orielle. The outflow of Lake Pend Orielle is the Pend Orielle River, which flows through the Albeni Falls Project, operated by the U.S. Corps of Engineers in Idaho. From Albeni Falls the Pend Orielle River flows into the State of Washington and through the Box Canyon Hydroelectric Project, owned and operated by the Public Utility District No. 1 of Pend Orielle County, Washington, and then through the Boundary Hydroelectric Project owned and

The importance of ultimate federal authority, and the impracticability of granting individual states a veto power over the conditions of individual project licenses, is graphically illustrated in the Noxon Rapids and Cabinet Gorge settings. Montana might well determine that its interests would best be served by requiring high minimum flows from those projects in the summertime in order to reserve extra capacity for wintertime flood control. Downstream, however, the state of Idaho might conclude that it should require high minimum flows in the spring and fall for fish passage, and the state of Washington might decide to require high minimum flows

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(Footnote 8 cont.) operated by the City of Seattle, Washington. The river then flows into the province of British Columbia where it passes through the Seven Mile and Waneta Hydroelectric Protects. In Canada, the river flows into the Columbia River. The Columbia River flows from its confluence with the Pend Orielle River into the State of Washington. There are eleven downstream hydroelectric projects with various federal and non-federal ownerships on the Columbia River.

in the winter to accommodate peaking needs for electric power. If each of those states could prevent the issuance or renewal of a license unless its unilaterally-determined and inconsistent conditions were met, the likely result would be impasse. FERC, exercising a unified licensing authority, can balance and accommodate competing interests and can resolve potential conflicts of that kind.

2. The Pacific Northwest Coordination Agreement: The Conditions of a Single Pacific Northwest Hydroelectric License Can Affect More Than 100 Facilities.

A central feature of the Federal Power Act is Congress's commitment to coordinated study and comprehensive planning along an entire river system as a part of the hydroelectric licensing process. National Wildlife Federation v. F.E.R.C., 801 F.2d 1505, 1507 (9th Cir.

1986). In the Pacific Northwest, as shown above, an "entire river system" often spans several states and may be partially in Canada.

Since the early 1960's, the operation of most of the hydroelectric projects in the Pacific Northwest has been closely coordinated in a way that provides substantial benefits to the public in the Pacific Northwest states and in Canada. The parties to the Pacific Northwest Coordination Agreement include 15 public and investor-owned utilities that own and operate hydroelectric facilities as well as the Departments of Energy and Interior, the Army Corps of Engineers, and the Bureau of Reclamation. The Agreement provides for the coordinated operation of well over a hundred hydroelectric plants, including 21 projects owned and operated by the United States government. Many of these projects are on the Columbia River and its tributaries; the rest are located

throughout the Pacific Northwest. Because the Bonneville Power Administration is a member of the coordinated system, any change in power production at a single hydroelectric facility affects the price paid for electricity by every ratepayer in the Pacific Northwest and in much of California.

One important impetus for the Coordination Agreement was the Columbia River Treaty between the United States and Canada, signed in 1961.[9] Pursuant to that treaty, large storage reservoirs have been constructed in Canada. Those reservoirs contribute to regulation of the flow and provide downstream power benefits at various hydroelectric projects in the United States. The benefits are shared with Canada.

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[9]"Treaty between Canada and the United States of America relating to the cooperative development of the water resources of the Columbia River Basin," September 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244.

A primary purpose of the Coordination Agreement is to optimize firm power production throughout the Pacific Northwest while taking into account non-power uses of water resources. Under the Agreement each project must be operated within applicable legal and regulatory constraints. The Agreement also implements the Columbia River Treaty with Canada.

Each year the coordinated system utilities, BPA, the Army Corps of Engineers and the Bureau of Reclamation plan the operation of all projects in the system for the next operating year. This planning is done on a system-wide basis as though all projects were under unified ownership and control. The result is a detailed hydroelectric regulation program which defines the limitations on drafting and refilling of all reservoirs. The coordination of minimum flows for fish passage is part of that regulation. The benefits of coordination are equitably

distributed through a complex contractual arrangement. The coordination is implemented by daily adjustment and fine-tuning as made necessary by the many variables, including especially the weather, which can affect the ongoing operation of the system.

Runoff in the region is highly variable and does not occur in the same pattern as do electric power requirements and fish migration requirements. For example, in the Columbia River Basin, monthly mean unregulated streamflows can range from 40,000 cfs in January to 1,240,000 cfs in May, and annual runoff has ranged from 78 to 193 million acre-feet. The system's total storage capacity will accommodate less than half the total annual runoff, even in a below-average year. Thus in the Pacific Northwest, unlike many other areas of the country, the benefits of a large portion of the annual runoff must be captured within a short time or be lost

forever. Taking such constraints into account, the coordinated system achieves a delicate balance among utility load requirements, reservoir storage capacity, and streamflow needs.

Each year the coordinated planning process must choreograph, for all of the system's more than 100 projects, the system-wide storage and release of water to provide for regional and international power needs while taking into account, for each project, such things as minimum flow requirements, upper storage limits for flood control and recreation, the need to set aside water for increased streamflows to aid in the downstream migration of fish, spills of water from individual dams to transport juvenile fish around the turbines, maximum outflows, tail water restrictions, and the specific operational constraints of each of the projects.

The result is a regional system which is coordinated electrically,

hydraulically, contractually and economically. Its electrical integration is accomplished through multiple transmission system interconnection. Its hydraulic integration is accomplished despite diverse ownership of multiple projects on various river systems. The Coordination Agreement and other operating agreements provide system efficiency as well as economic and other benefits. Benefits include the ability to adjust flows through turbines to meet changes in load, the ability to draft reservoirs to allow for refill and flood control in the spring, and the ability to provide storage to meet power needs in the summer and during low flow conditions.

Minimum flow requirements, which reduce the system's flexibility, can have a substantial impact on the ability of the system as a whole to optimize power production. Such requirements affect not only the individual project upon which they

are imposed, but potentially every project and utility in the entire coordinated system. Those effects are felt across state and international boundaries. If Oregon, Washington, Idaho, Montana, and Wyoming could each impose minimum flow requirements based on legally-mandated local self-interest (see pp. 27-28, below), the result would be the disruption of the economic viability of projects hundreds of miles downstream. It could even include destruction of an ocean fishery.

3. The Federal Hydroelectric Regulatory System Is Operating as Congress Intended.

Congress, in the exercise of its power over interstate commerce, has authorized FERC to regulate through its licensing procedures the construction and operation of hydroelectric projects on navigable waters, U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940), reh. den. 312

U.S. 712 (1941), pet. den. 317 U.S. 594 (1942), or otherwise affecting interstate commerce. F.P.C. v. Union Electric Co., 381 U.S. 90, reh. den. 381 U.S. 956 (1965). 16 U.S.C. § 797(3). Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, extends the power of the Federal Power Commission (now FERC) over hydroelectric projects to the full extent permitted under the Commerce Clause. 381 U.S. at 105.

The Federal Power Act is a comprehensive scheme of regulation which requires FERC to balance multiple interests, including those of the state and federal governments. Section 10(a) of the FPA requires that FERC consider not only hydropower but also other beneficial uses in its determination of the public interest. This Court has emphasized that requirement:

> "The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues

> relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife."

Udall v. Federal Power Comm'n., 387 U.S. 428, 450 (1967).

That FERC actually does take all the required interests and areas into account is evident from the examples discussed above at pp. 7-14. In its licensing proceedings FERC not only considers a wide variety of issues, but considers these issues from the perspectives of many parties.

The breadth of FERC's Congressionally-mandated concern with the public interest contrasts markedly with the interests of individual states which necessarily are more localized and parochial. For example, the Water

Resources Code of the State of Washington provides:

> "It is the purpose of this chapter to set forth fundamentals of water resource policy for the state to ensure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington." Wash. Rev. Code § 90.54.010 (emphasis added)

> "Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state." Wash. Rev. Code § 90.54.020(2) (emphasis added)

The Montana Water Use Code embodies that state's policy to

> ". . . provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people . . ." Mont. Code Ann. § 85-2-101(3) (emphasis added)

Similarly, Oregon's water resources policy is to be guided by a legislative finding that:

> "The maintenance of the present level of the economic and general welfare of the people of the state and development of this state for the increased economic

> and general welfare of the people thereof are in large part dependent upon a proper utilization and control of the water resources of this state . . ." Or. Rev. Stat. § 536.220(1) (emphasis added)

FERC properly takes the states' local interests seriously in its licensing proceedings (see pp., 7-14, above). However, Congress did not intend that local or parochial interests be the basis for giving individual states a veto power over hydroelectric projects which FERC has determined are in the interest of all the public.[10] If Congress had so intended, it would have made that intent clear. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 178-79 (1946).

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[10]The states would certainly not have that power without Congressional authority. The Commerce Clause precludes a state from mandating for its residents a preferred right of access to natural resources located within its borders. New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982). Moreover, in navigable waters the pre-eminent authority to regulate the flow resides with the federal government. Id. at note 6.

Instead of evidencing such an intent, Congress in the FPA created detailed provisions which "leave no room or need for conflicting state controls." 328 U.S. at 181.[11]

The states themselves have recognized that the ultimate authority rests with the responsible federal agency, not with individual states. For example, the Washington Supreme Court has recognized that in the FPA Congress has

> ". . . preempted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper."

Tacoma v. Taxpayers, 43 Wash.2d 468, 489, 262 P.2d 214 (1953). It was the

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[11]In recent decisions construing other statutes, this Court has held that parochial state interests cannot disrupt what Congress intended to be a comprehensive federal regulation of interstate commerce. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 108 S.Ct. 1145 (1988); City of New York v. F.C.C., 486 U.S. 57, 108 S.Ct. 1637 (1988).

Commission, the court held, not any state agency

> ". . . which under our constitutional government must pass upon the measures necessary for the protection anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States."

43 Wash.2d at 493. The Oregon Supreme Court, when faced with the question whether the state has the power to veto a federal license for a hydroelectric project on a navigable stream, concluded that neither Section 9(b) nor Section 27 of the FPA granted such a right. State v. Idaho Power Co., 211 Or. 284, 291, 312 P.2d 583 (1957).

Recent Congressional action documents a clear intent that FERC, not the states, is responsible for and has final authority for performing the licensing function. The Electric Consumers Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495 (October 16, 1986) added Section 10(j) to the Federal Power Act.

That new provision requires that each license issued by FERC include conditions for protection and enhancement of fish and wildlife. 16 U.S.C. § 803(j). Those conditions shall be based on recommendations of the National Marine Fisheries Service, the United States Fish and Wildlife Service, and state fish and wildlife agencies unless FERC specifically finds that those recommendations are inconsistent with the governing law. 16 U.S.C. § 803(j)(2). It is clear from the legislative history that Congress, by adding that requirement to the Federal Power Act, did not intend to grant the states a "veto over a project," but rather to require "heavy reliance and acceptance by FERC, except in limited circumstances," of agency recommendations. H.R. Rep. No. 99-507, 99th Cong., 2d Sess. p. 22 (1986), reproduced at 1986 U.S. Code Cong. and Adm. News 2496, 2509. Although Section 10(j) "upgrades statutorily the

importance and status of fish and wildlife recommendations," they nevertheless remain "'recommendations,' not mandatory requirements." H.R. Rep. No. 99-934, 99th Cong., 2d Sess. p. 25 (1986), reproduced at 1986 U.S. Code Cong. and Adm. News 2537, 2541. Under new section 10(j), FERC remains empowered to decide license terms and conditions (id. p. 23, reproduced at p. 2540).

In 1946 this Court, in First Iowa, concluded that Section 27 of the FPA had primary, if not exclusive, reference to the states' traditional authority over the allocation of proprietary water rights. 328 U.S. at 175-76. In 1986 Congress enacted ECPA, which includes many amendments to the FPA. Nevertheless, Congress chose not to make any changes in Section 27 as construed by this court in First Iowa. Moreover, in spite of the intervening decision in California v. United States, 438 U.S. 645 (1978), upon

which Petitioner relies, it is clear from the statute itself and from the legislative history that when it enacted ECPA Congress did not intend that the states have a veto power over federally-licensed projects through their regulatory laws designed to protect local interests. No statutory "upgrading" would have been necessary if the states could have imposed minimum flow conditions under the limited authority reserved to them by Section 27. This Court should give effect to Congress's clear intent to preserve the long-standing construction of Section 27 of the FPA. Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596-97 (1980); Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

Both before and after the enactment of ECPA, the states have participated in decisions about hydroelectric power by allocating priorities to water rights within their jurisdictions and by advancing and

advocating localized interests in the FERC licensing process. The issue in this case is not whether those interests will be protected. FERC is required to, and does, take them into account in the Congressionally-mandated balancing process. But the ultimate balance must be struck at the federal level, as provided in the FPA, without threat of additional conditions which a state might unilaterally impose based on purely local state interests. A system of dual authority would allow individual states to defeat Congressional purposes and federal policies. That is not what Congress intended.

CONCLUSION

Congress has always intended that FERC have the final authority to determine the conditions to be imposed upon the operation of hydroelectric facilities which affect interstate commerce. The Pacific

Northwest's highly-integrated system of hydroelectric power production shows how the federal regulatory system, as prescribed by Congress, works. The states' local interests are protected because FERC is required to take them into account. Congress never intended that those local interests be protected by the exercise of a local veto power through the imposition of operating conditions which FERC has not found to be in the public interest.

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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By _____
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Northwest Utilities

Appendix A

I. The Public Generating Pool and Its Members.

The Public Generating Pool is a group of seven publicly-owned generating utilities located in the Pacific Northwest: City of Seattle, City Light Department (Seattle City Light); the City of Tacoma, City Light Department (Tacoma City Light); Chelan County Public Utility District (PUD); Cowlitz County PUD; Douglas County PUD, Grant County PUD; and the Eugene Water & Electric Board (EWEB).

The PGP utilities own hydroelectric facilities, licensed by FERC under the FPA, that have total nameplate ratings of nearly 700 Mws. Some of these facilities are described in detail below.

These utilities serve nearly six hundred thousand retail customers. They are all interconnected through the Bonneville Power Administration (BPA). As signatories to the Pacific Northwest

Coordination Agreement, they coordinate their operations with the other privately and publicly-owned generating utilities in the Pacific Northwest as well as with BPA, the Corps of Engineers and the Bureau of Reclamation.

A. Seattle City Light.

Seattle City Light owns four hydroelectric projects: Boundary, the Skagit Projects (Ross, Diablo and Gorge), Newhalem Creek, and Cedar Falls. These projects have a total nameplate rating of 1200 Mws annually. Seattle also purchases from five other hydroelectric projects.

Seattle also has a FERC license for its project on the South Fork of the Tolt River, License No. 2459, which has been stayed pending a comprehensive, cumulative assessment of appropriate minimum flows in light of all Snohomish River Basin applications. The stay was requested by the Washington Departments of Fisheries and

Game[1], the Tulalip Tribes, the National Marine Fisheries Service and the United States Department of Interior; the positions of those entities will be considered before FERC finally determines the license conditions.

The Skagit Project, License No. 553, includes Ross Dam whose reservoir is partially in British Columbia and is fed by Canadian streams. In addressing license revisions for that project, FERC has not only considered minimum flows suggested by the Washington Departments of Fisheries and Game, but has also required Seattle to address British Columbia Basin matters and to consult with the International Joint Commission. Cf. Federal Power Commission, Opinion No. 808, July 5, 1977.

B. Tacoma City Light.

Tacoma City Light has three federally-licensed hydroelectric projects

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[1]The former Washington Department of Game is now the Washington Department of Wildlife

which have a total rating of approximately 700 Mws. It also purchases from other hydroelectric facilities. Tacoma's projects involve rivers with high spring runoffs when compared to reservoir storage capacity. FERC, in these licenses in particular, has had to balance federal Army Corps of Engineers flood control concerns with State of Washington instream flow recommendations for fish migration as well as with power production and other concerns.

C. Chelan County PUD.

Chelan County PUD holds three federal licenses for hydroelectric facilities with a total rating of 1884 Mws, including two on the Columbia River: Rock Island and Rocky Reach. The Columbia River flows from British Columbia through Washington, then forms the border between Oregon and Washington until it empties into the Pacific Ocean. There are federally and non-federally owned dams on the Columbia

River and on its chief tributary, the Snake River. The Snake River originates in Wyoming, flows through Idaho, then forms the border between Idaho and Oregon and between Washington and Idaho before joining the Columbia River in Washington.

D. Cowlitz County PUD.

Cowlitz County PUD holds the license for the Swift Project, #2, License No. 2213, on the Lewis River. The project has a rating of 70 Mws and is operated in close conjunction with three nearby projects owned by the Pacific Power & Light Company. This license has provisions for federal navigation and flood control activities by the Army Corps of Engineers.

E. Douglas County PUD.

Douglas County PUD owns the Wells Dam on the Columbia River. Wells has a rating of 820 Mws. The Wells license is described at pages 7-10 of the brief.

F. Grant County PUD.

Grant County PUD owns two large federally-licensed hydroelectric facilities, Priest Rapids and Wanapum, on the Columbia River. Priest Rapids and Wanapum are rated at 788.5 and 880.4 Mws, respectively. Grant also purchases from several small hydroelectric projects. The history of the Priest Rapids license is described at pp. 10-14 of the brief.

G. Eugene Water & Electric Board.

The Eugene Water & Electric Board has three federally licensed projects on the McKenzie River in Oregon with a nameplate rating of 111.5 Mws. In 1973, the State of Oregon acknowledged FERC's authority to set minimum flows on this stream when it asked EWEB to request that FERC modify the minimum flow requirements under EWEB's federal License No. 2496 at Leaburg Dam which was done and approved by FERC.

II. The Washington Water Power Company.

The Washington Water Power Company was incorporated in 1889 in the Territory of Washington, and has its principal offices in Spokane, Washington. The company service area has an estimated population of 700,000. Over 60 percent of WWP's peak generating capacity is furnished by nine hydroelectric generating stations located in the states of Washington, Idaho and Montana. WWP also purchases from other utilities, under long-term contracts, power generated by other hydroelectric facilities. Its situation is described in more detail at pp. 14-15 of the brief.

III. Montana Power Company.

The Montana Power Company is a combination electric and natural gas utility organized and authorized to conduct its business under the laws of Montana. A substantial portion of Montana Power's electric generating resource, which serves more than 245,000 electric customers, is

hydroelectric generation. Montana Power currently owns and operates fourteen dams, all licensed by FERC.

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No. 88-705

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND UTAH POWER & LIGHT COMPANY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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No. 89-333

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND UTAH POWER & LIGHT COMPANY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

This brief is filed pursuant to Rule 37 of the Rules of the Supreme Court of the United States by the Pacific Gas and Electric Company, the Southern California Edison Company, the Pacific Power & Light Company and the Utah Power & Light Company (collectively Western Utilities)[1] as *amici curiae* in support of Respondent, the Federal Energy Regulatory Commission (FERC).

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[1] Pacific Power & Light Company and Utah Power & Light Company are now assumed business names for divisions of the electric operations of PacifiCorp pursuant to a merger consummated in 1989.

Western Utilities, whose service area includes all or significant parts of seven western states, own and operate 92 hydroelectric projects under FERC licenses. In an average year, these facilities produce approximately 20,125,920,000 kWh of electricity. Western Utilities are concerned that state agencies, including Petitioner State of California, through the California State Water Resources Control Board (CWRCB), are beginning to assert, under the guise of water rights allocation proceedings, authority to regulate projects already under FERC jurisdiction. The confusion and duplication of regulatory requirements that would result from such assertions threatens Western Utilities' individual projects, their integrated systems, and the nation's hydropower resources as a whole. Western Utilities urge this Court to affirm the United States Court of Appeals for the Ninth Circuit's ruling in this case[2] that FERC has the exclusive jurisdiction to set regulatory conditions, including minimum instream flows for fish protection, at hydroelectric projects licensed under the Federal Power Act.

INTRODUCTION

The State of California's appeal in this case, and its attack on this Court's decision in *First Iowa Hydro-Electric Coop. v. FPC (First Iowa)*,[3] depends entirely on claims that, (1) Section 27 of the Federal Water Power Act of 1920[4] was intended to authorize state regulation of federally licensed hydroelectric projects and, (2) that legislative history requires that Section 27 be interpreted in a lock-stepped, identical, manner with Section 8 of the Reclamation Act of 1902.[5] Western Utilities will concentrate this brief on just what the Federal Water Power Act was intended to do, on

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[2] *California ex rel. State Water Resources Bd. v. FERC*, 877 F.2d 743 (1989), *cert. granted California v. FERC*, 58 U.S.L.W. 3369 (U.S. Dec. 4, 1989) (No. 89-333).

[3] 328 U.S. 152 (1946).

[4] 41 Stat. 1077 et seq.; now Part I of the Federal Power Act, 16 U.S.C.A. § 821.

[5] 32 Stat. 390; 43 U.S.C.A. §§ 372, 383.

why the Reclamation Act's interpretation cannot dictate a result here and on how California's desired result conflicts with the Federal Power Act's intention to establish a stable, consistent, licensing system.

SUMMARY OF ARGUMENT

The Federal Power Act's comprehensive regulation of federally licensed hydroelectric development is not susceptible to disruption by state regulatory limitations on hydroelectric operation like those advanced by the State of California because:

1. The Federal Water Power Act of 1920 was created to encourage the development of water power deemed essential for the Nation's progress through comprehensive *federal* hydroelectric regulation, a purpose confirmed and reinforced in the Federal Power Act of 1935.

2. Section 27 of Federal Water Power Act was intended only to defend state laws allocating vested ownership rights to water and not to authorize conflicting state regulatory controls of hydroelectric development.

3. The Reclamation Act of 1902 was not, and is not, the Federal Power Act.

4. The result sought by California would strike at the heart of the licensing stability the Federal Power Act was deliberately designed to create.

ARGUMENT

I. THE FEDERAL WATER POWER ACT WAS INTENDED TO CREATE A COMPREHENSIVE *FEDERAL* SYSTEM OF WATER POWER LICENSING AND REGULATION

The bill that would become the Federal Water Power Act of 1920, merging federal authority over navigation, public lands and interstate commerce, was introduced as an "Administration Bill" in 1918. It was presented to a unique, combined, "Committee on Water Power" in the House of Representatives created at the

special instance of the President,[6] was considered and debated over the next two Congressional sessions, and was enacted early in 1920.[7]

Previous water power legislation had started up separate tracks dealing with public lands and navigation in both the House and the Senate, had been further split among various House Committees, and had faltered on inconsistency and lack of consensus.

World War I brought forth a *national* desire to build up the country's hydroelectric resources as quickly as possible to meet burgeoning demand for electricity under both wartime and anticipated post-war conditions, along with a growing realization of the interconnected, interstate, character of emerging electric systems. The result was a bill that established the same, comprehensive, licensing scheme for projects in navigable waters and on public lands and made provision for discretionary licensing of any project affecting interstate commerce. That basic plan was one that the Administration, private water power developers, and conservationists could unite behind. The Act, because it created a thoroughly federal system of regulation, was not actively embraced by all westerners (many of whom wanted *all* public lands jurisdiction handed over to the states), but they also accepted it based on a desire for speedy development.

The opening witness in the hearings of the Special House Water Power Committee, and the Administration's principal spokesman, ticked off the primary factors driving the legislation:

> • Increased fuel costs have resulted in increased costs of steam-power production and have made the development of power independently of fuel—that is, water power development—increasingly desirable. . . . [T]he utilization of water power reduces pro tanto the use of fuel and lessens the drain

[6] H. Rep. No. 716, House Comm. on Water Power, 65th, Cong. 2d Sess. (1918) at 8-9.

[7] 41 Stat. 1063 *et. seq.*

> on our fuel resources, particularly and most vitally important, the drain on our petroleum resources.[8]
>
> • The demand for power will continue to increase while war continues, in order to supply power to our constantly expanding war industries, and when the war is over to provide for the extension of public utilities and of the electro chemical industries, for electrification of railroads, and for the multitude of other activities that will accompany the period of reconstruction.[9]
>
> • While interconnection of stations is a measure of economy in steam-power development, it is a measure of necessity in any general waterpower development. . . . On account of the extent of the territory which will be involved and of the fact that the power transmission system must ignore State lines, no authority less than the Federal Government will have sufficient jurisdiction either to conduct the investigations or to exercise control over the completed systems.[10]

Senator Jones of Washington, Chairman of the Senate Commerce Committee, put a slightly more emphatic cast on the nation's need for the legislation:

> Why not give those who would develop our working water powers the right to work, the right to build and expand and develop, the right to create a greater and more powerful industrial Nation? Why not give them a law to work under which shall encourage and not hamper their just activities—a law which, while placing them under the constant supervision of the public authorities, and sufficiently safeguarding every public interest, yet shall be of such a fair and businessmanlike nature that under its operation men may hope for a generous return for their work and risk, and capital be

[8] Water Power: Hearings Before the Committee on Water Power, 65th Cong. 2d Sess., (1918) (Hearings), O.C. Merrill at 9.

[9] *Id.* at 10.

[10] *Id.* at 16.

> assured for a safe investment? This done, they will open up deserts and make farms; they will build factories and cities, open up new reaches of inland waterways, employ labor and reduce the cost of living.[11]

The consensus available in 1918-1920, missing prior to that, was that electricity was absolutely essential to the nation's industrial and commercial fabric and water power development was far too important to be further delayed by jurisdictional wrangling and regional jealousy. That conviction carried the Federal Water Power Act through to enactment.

In 1935, the Federal Water Power Act's vision of the national importance of electricity in general and water power in particular was renewed and reinforced with passage of the Federal Power Act, establishing new federal jurisdiction over wholesale electric transactions and specifically extending federal hydroelectric jurisdiction to the fullest by requiring *mandatory* review and licensing of all proposals found to affect interstate commerce.[12]

In 1946, this Court, in *First Iowa*, confirmed the comprehensive character of the Federal Power Act's regulatory scheme and rejected an attempt by the State of Iowa to install its own, competing, regulatory rules.[13] In this case, the State of California asks the Court to ignore the Federal Power Act's primary goal of advancing hydropower development through comprehensive federal authority and to accept instead the notion that the Act secretly intends duplicating systems of federal and state control.

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[11] 59 Cong. Rec. 244 (1919).

[12] *Compare* Section 23(b), 41 Stat. 1075 (1920) with 49 Stat. 846 (1935), 16 U.S.C.A. 817(1).

[13] 328 U.S. 152, 181-182 (1946).

II. SECTION 27 OF THE FEDERAL WATER POWER ACT WAS NOT INTENDED TO AUTHORIZE CONFLICTING STATE CONTROL AND REGULATION OF FEDERALLY LICENSED WATER POWER DEVELOPMENT

By 1918 there was little remaining controversy concerning federal or state authority over water power development. The primary concern of western congressman had always been irrigation and reclamation. Since water power production employs but does not consume water, they were willing to accept complete federal hydro power regulation so long as it preserved state authority to allocate property rights for irrigation and related uses.

There were a few representatives who unquestionably would have preferred state regulation of hydropower development. Congressman Mondell of Wyoming, centrally relied upon by the State of California,[14] repeatedly sought legislation that would provide water power developers with the blanket right to occupy public lands with all regulation of that development remitted to the states. His attempts failed.[15] By 1918, Congressman Mondell, while still asserting that "no legislation is necessary ... other than a good right-of-way act"[16], was simultaneously compelled to observe that "I am assuming that this committee is not proposing to depart from the plan ... outlined in the bill before it, and I simply make that statement in order to keep my record straight."[17]

The Administration Bill contained a provision relating to an applicant's responsibility for providing evidence of his progress in securing state water rights."[18] In the course of the hearings a representative of the New York Conservation Commission proposed that the reference to compliance with state procedures be

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[14] Pet. Br. at 23-24, 30-31 n. 14, 32-33 n. 15, 33-34.

[15] *See* 51 Cong. Rec. 13931-2 (1914).

[16] Hearings., *supra* at 607.

[17] *Id.* at 608.

[18] A precursor of FPA Section 9(a)(2), 16 U.S.C. § 802(a)(2).

expanded to require proof that an applicant had in fact "obtained the consent of the duly constituted authorities of the State" to his waterpower proposal.[19] Congressman Raker of California, one of the most prominent of the "westerners", responded that any such requirement for consent "would practically change the real fundamental principle of this bill", because "the whole scheme would be subject to the regulation and control, in effect, of the State."[20] He went on to draw the critical distinction between merely providing initial evidence of compliance with state rules allocating proprietary water rights and subjecting water power development to state regulatory control by asking "would you not really make [the federal] legislation subordinate to what the State might determine, not only upon navigable streams but particularly on the nonnavigable streams and on public lands"?[21] The suggestion that an applicant must submit to state regulatory control was thus specifically presented to the Committee and was rejected because *it would "subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind."*[22]

California argues that the Federal Water Power Act's Section 27 was designed to allocate to the states control over the question of how much water should bypass a federally licensed hydroelectric facility to balance fish and wildlife concerns. California's claim has nothing to do with the protection of irrigation, municipal, mining, industrial or any other traditional, proprietary, use of water; nor has California's claim anything to do with any vested rights in and to such uses. Yet the history it relies upon shows that

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[19] Hearings., *supra* at 361.

[20] Hearings, *supra* at 364.

[21] Hearings, *supra* at 366.

[22] Hearings, *Id.* (emphasis added). Congressman Raker also figured in the later, more technical, debate over whether Section 9's "compliance" requirement would be workable. It was that interchange that detailed Section 9 as "simply requir[ing] that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application". (56 Cong. Rec. 9813, Cong. Mondell (1918). *Cf. First Iowa* at 179.

Section 27 was created solely to protect laws authorizing such uses and the appropriative priorities relating to them.

Even before 1918, it was clear that Section 27's precursors had reference only to:

> . . . vested rights or the State laws with reference to water rights or the appropriate distribution of water used for irrigation or municipal purposes.[23]

California cites Congressman Taylor of Colorado at some length as supporting its expansionist view of Section 27.[24] But Congressman Taylor was quite clear in stating his own belief that, while irrigation rights would still be handled by the states, the Federal Water Power Act would be the source of *all regulatory authority to create water power development and to use water for hydroelectric purposes:*

> *This is a power bill and grants rights for power.* Now, if a party appropriates water under State law, or if one of these companies makes an appropriation . . . for irrigation under State law they will have that additional property right *in addition to the power privilege granted here;* but this bill is for the purpose, as I understand it, of giving *authority to create power and utilize water for power purposes.*[25]

Section 27's limited scope was further confirmed on the Senate side, where a leading Senate Conferee, who opposed any federal

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[23] 51 Cong. Rec. 13625 (1914) [Statement of Congressman Ferris *re* H.R. 16673—his own bill]. California now studiously avoids its Ninth Circuit reference to Congressman Ferris' description. *See* Pet. Opening Br. below, March 18, 1988, at 21-22.

[24] Pet. Br. at 24-26, 28, 34.

[25] Hearings, *supra*, at 92 (emphasis added). In subsequent debate Congressman Taylor specifically claimed credit for his success "in getting section 27 put into this bill, *which is the savings clause of our irrigation rights*" (56 Cong. Rec. 9115 (1918) (emphasis added)), closing the circle between his acceptance of federal authority over usage of water for hydropower development and Section 27's protection of state granted property rights.

license fee on states' rights grounds, dismissed concerns about control over water as follows:

> So far as *irrigation* is concerned, and so far as the *use of water for domestic purposes* is concerned, the bill saves to the States all the rights that they have under their State legislation.[26]

Senator Jones of Washington, the most powerful of Senatorial "westerners", had precisely the same view of Section 27:

> The bill expressly provides that nothing contained therein shall affect or interfere with *the laws of the respective States relating to the control of or use of water used for irrigation or for municipal purposes.*[27]

The fact is that western congressmen in the early years of this century wanted *development* and had no interest in incidental power diversions that would not interfere with irrigation, municipal or related consumptive uses.

> Mr. Taylor. . . . is there any reason why we should not enact legislation that will open up resources throughout all the States of the country, especially at this time? Wouldn't it be a wise, statesmanlike proposition?
>
> Mr. Weston. I should say it was, sir; yes, sir. In other words, my plea is for liberality and speed.[28]

The State of California wants to use the men of 1914-1920 to make its case, but it must take them whole—and their views on hydropower development and control were fundamentally at odds with California's disruptive view of Section 27's passive, "saving" language.

As noted above, Congressman Mondell's sporadic efforts to secure water power regulatory power for the public lands states

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[26] 59 Cong. Rec. 1041 (Senator Nelson) (1919) (emphasis added).

[27] 59 Cong. Rec. 245 (1919) (emphasis added).

[28] Hearings, *supra* at 371.

was a lost cause by 1918. In the 1918 hearings, though not a member of the Special Committee, he promoted the inclusion of a Section 27-like provision (albeit without the limiting words "used in irrigation or for municipal purposes or other uses, or any vested right acquired therein").[29] But, in doing so, he and Congressman Taylor, collectively, made it clear that those words were confined to irrigation and related uses and were not intended to limit a power use that would not adversely affect those uses:

> Mr. Taylor. Let me go back to [the Section 27 language] you suggested. *Is it not true that if there is no intention, covertly or otherwise, of infringing upon the irrigation vested rights* in the States ownership of the water on the public lands and nonnavigable streams, *that clause will do no harm by being there?*
>
> Mr. Mondell. I should say not.[30]

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[29] Hearings, *supra* at 613.

[30] Hearings, *supra* at 634 (emphasis added). As the Act moved forward, Congressman Mondell, while still talking about inherent state's rights (*See* 56 Cong. Rec. 9814; *First Iowa* at 179), was forced to concede federal control:

> In my section of the country water power entirely free from Federal control will be running side by side *with water power under Federal control*, and that will be true in every State in the union having nonnavigable streams.

56 Cong. Rec. 9114 (1918) (emphasis added).

That description, in turn, called forth the obvious observation that:

> The line of jurisdiction between Federal control and State control is, of course, very clear and easily stated, *but where once jurisdiction has attached and where once it is put in force, by and through this bill, then I understand that the jurisdiction will be absolute and the State will not be permitted to interfere in any way.*

Id., Congressman Green (emphasis added).

Mondell's response listed possible state/federal overlaps with respect to (1) depreciation reserves and safety, (2) property taxation, and (3) rate regulation—letting stand the central power proposition with respect to control over water power that "once [Federal] jurisdiction has attached . . . [it] will be absolute and the State will not be permitted to interfere in any way." *Id.*

Mondell and Taylor went on to confirm Section 27's purely defensive function:

> Mr. Taylor. And *if there is any such intention* anywhere [i.e. of infringing upon 'irrigation vested rights'], it is of the utmost importance, is it not, for the protection of the people of these Western States, that there should be a claim of that kind in there?
>
> Mr. Mondell. It is of very great importance . . . .[31]

There it is, from the same historical figures California cites for its theory. If a licensed hydroelectric project would not interfere with irrigation-related "vested rights", the saving language placed in Section 27 could not harm complete federal control.

III. THE RECLAMATION ACT OF 1902'S INTERPRETATION IN *CALIFORNIA V. U.S.* DID NOT CHANGE EITHER THE FEDERAL POWER ACT OR SECTION 27

California's assertion that this Court was wrong in *First Iowa* is not based on any change in the Federal Power Act or on anything drawn from the body of judicial and regulatory decisions interpreting the Act since *First Iowa*. Instead, California leaps across 26 titles of the United States Code and 88 years of history to the Reclamation Act of 1902.[32] It demands that the Federal Power Act's Section 27 now be lock-stepped with the Reclamation Act's Section 8, and ignores the immense differences between Congress' 1902 plan to help irrigate the arid west and its 1920 program for comprehensive, nationwide, federal administration of hydroelectric projects.[33]

The Federal Power Act and the Reclamation Act addressed two entirely different problems and were constructed on completely different plans. The Reclamation Act was intended to put federal dollars derived from the sale of public lands in the western

[31] Hearings, *supra* p. 635 (emphasis added).

[32] 43 U.S.C.A. §§ 372, 383.

[33] Pet. Br. at 14.

states back to work in creating public works to irrigate those states. Since the Reclamation Act was created at the instance of the affected states solely for their own, parochial, benefit, it's hardly surprising that the Act has been interpreted as subservient to state water law and policy.

In *California v. United States*,[34] the case now promoted by California as binding here, the Supreme Court stressed the clarity with which the Reclamation Act's legislative history showed that state law was expected to control *every* significant question of water usage and disposition, including the government's own appropriation, purchase or condemnation of water rights and all matters of water distribution.[35] It was thus in the context of a statute whose federal "regulatory" content was virtually nonexistent that the confirmatory Section 8 was installed:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.[36]

In *California v. United States*, California sought to impose limitations related to environmental concerns on water rights being sought by the Bureau of Reclamation for a reservoir. The limitations, while perhaps annoying to the Bureau, were certainly consistent with the Congressional intention to follow state law in

[34] 438U.S. 645 (1978).

[35] *California v. United States* at 665-667.

[36] Sec 8, 32 Stat. 390; 43 U.S.C.A. §§ 372, 383.

supplying water to benefit the state's residents. In the absence of any significant federal regulatory scheme, this Court concluded that there was no preemption and that the state was free to impose regulatory conditions on a reclamation project's use of water.[37]

The Federal Water Power Act, as we have seen, was based on an entirely different intention to create and install a comprehensive, unifying, federal scheme of regulation over hydropower development with irrigation included as only one element in the licensing equation:

> The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious.[38]

The Federal Water Power Act, reenacted in the Federal Power Act in 1935, has been the subject of an imposing array of Supreme Court decisions—all confirming the comprehensive character of its regulatory scheme.[39]

California claims to see a secret qualification behind these indisputable facts, citing to passages in the legislative history indicating that some western congressmen saw the language placed in Section 27 as drawn from similar language used in the

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[37] *California v. United States*, 438 U.S. 645, 675.

[38] *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98 (1965): *Cf.* FPA Section 10(a), 16 USCA 803(a).

[39] *Cf. United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424-427 (1940); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180-181 (1946) *FPC v. Oregon*, 349 US 435, 441-446 (1955); *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98-101 (1965); *Udall v. Federal Power Commission*, 387 U.S. 428, 448-451 (1967).

Reclamation Act's Section 8,[40] but the distinction between the Reclamation Act's complaisant accommodation of state authority and the Water Power Act's robust plan for federal regulation and control was as clear before 1920 as it is today. California's domino theory of statutory interpretation relies heavily on Congressman Mondell (describing him as "the principal author of Section 8 of the Reclamation Act of 1902"), and on his 1914 observation that Section 27's language was "somewhat similar" to the Reclamation Act's Section 8.[41] But the quote provided in California's brief is too closely pruned. The Congressman's complete statement shows that he understood that any "saving" clause in the Federal Power Act would be subjected to a much more critical reading than "similar" language in the Reclamation Act.

In the portion cited by California, Mr. Mondell observed with reference to a 1914 Section 27 precursor that "[i]t is somewhat similar to the provision contained in the reclamation law. . . . ",[42] but he went on to emphasize the importance of the Reclamation Act's lack of any federal regulatory scheme:

> . . . but that provision is all-sufficient as it stands in the reclamation law, *for there is nothing in that law that need raise the question of the right of the State to control the use of water.*[43]

In the Power Act context, Congressman Mondell was not at all satisfied that Section 27 could accomplish what might be done under Section 8 in the Reclamation Act:

> . . . it is not only exceedingly important that it [Section 27 language] remain in the bill, but that it is even more important that other provisions of the bill in conflict with it should go out. It would also be well if this provision of the bill could be so broadened as to clearly express the fact that nothing contained in this legislation should, and nothing

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[40] Pet. Br. at 24-25, 28

[41] Pet. Br. at 23, 24.

[42] 51 Cong. Rec. 13631, Pet. Br. at 24.

[43] 51 Cong. Rec. 13631 (emphasis added).

contained in it can, in fact, interfere with the right of a state to regulate the use of nonnavigable water for all purposes within its boundaries.[44]

A little later on he put it even plainer:

> The only trouble about this provision is that it is not complete enough and far-reaching enough, and I shall offer an amendment to broaden its provisions. *It is not as good a provision as that contained in the irrigation [Reclamation] law*, which, by the way, I had the honor of drawing. *It is not as broad and all-embracing a provision*, but with a slight amendment, including the word 'power', it will do very well.[45]

Section 27's terms, as it turned out, were not broadened as Mr. Mondell desired, state authority was never extended beyond the uses enumerated in Section 27 and Section 8's function within the Reclamation Act remains sharply different from Section 27's role in the Federal Power Act. No amount of claiming that Section 27 was modeled after Section 8 can get around the simple fact that:

> Notwithstanding some similarity in the wording of the statutes, *they serve different objectives, and relate to federal actions fundamentally dissimilar in nature.*[46]

IV. THE OVERRULING OF *FIRST IOWA* WOULD DESTROY LICENSING STABILITY THE FEDERAL POWER ACT WAS CREATED TO PROVIDE

The Federal Water Power Act was the result of a consensus judgment that separate, variable, licensing requirements were thwarting development. Accordingly, one of the Act's most essential goals was the establishment of a single, comprehensive federal licensing system, designed to "promote secure licensee expecta-

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[44] *Id.*

[45] 51 Cong. Rec. 14070 (1914) (emphasis added).

[46] *Springfield v. McCarren*, 549 F.Supp. 1134 (D.Vermont 1982), aff'd., 722 F.2d 728 (2d Cir. 1983); *cert. den.*, 464 U.S. 942 (1983) (emphasis added).

tions".[47] The course proposed by California would thoroughly disrupt that plan.[48]

All FPA licenses now include provisions relating to the protection of fish and wildlife resources.[49] Since every reduction in flow reduces electrical output, flow release conditions like those installed in the Rock Creek license are vital ingredients in the assessment of a project's economic feasibility and its benefit for the consuming public. FERC has been particularly solicitous of fisheries concerns in the western United States; Western Utilities and their customers now encounter a thicket of interrelated flow release and study requirements in every license that comes out. The result is a complex set of operating rules and requirements individually crafted to fit each project. Compliance is critically dependant on the clarity and consistency of the standards.

Under California's interpretation of Section 27, the holder of a federal license would now have a crazy quilt of state rules laid on top of its existing release requirements—all in an atmosphere threatening swift retribution if requirements are overlooked.[50]

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[47] *Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983).

[48] California notes in its brief that hydroelectric developers in California have routinely applied for and secured state water rights that correspond to their use of water for power generation. Pet. Br. at 8 n. 2. Of course, pursuant to Section 9 of the Federal Power Act, Pacific Gas and Electric Company, Southern California Edison Company, and other power developers have routinely made application to the State. As this Court observed in *FPC v. Oregon*, 349 U.S. 435, 450-51 n. 24 (1955) "While we hold that such approval is not necessary, there is no reason why the company should not thus seek State as well as Federal approval of the project". The real point is that, up until now, California has not attempted to use its acceptance of water power entitlements as a tool for undermining federal licensing authority.

[49] *See Udall v. Federal Power Commission*, 387 U.S. 428, 450 (1967); FPA Section 10(j), 16 U.S.C.A. 803(j).

[50] *E.g.*, under FPA Section 31 noncompliance with a federal license term can lead to civil penalties of up to $10,000/day. 100 Stat. 1255, 16 U.S.C.A. 823(b).

California argues that so long as its requirements are more stringent than FERC's there is no conflict. But that overlooks the fact that FERC's mandate, and indeed society's imperative, is the *balancing of* conflicting concerns.[51] A change that increases a flow release, thereby decreasing economic benefits flowing to the public, destroys the balance just as effectively as a change in the opposite direction.

With Western Utilities' transmission interconnections, the end result of a California desire to increase flow releases at the cost of reduced power generation is the withdrawal of electricity otherwise available to consumers throughout the western United States. This withholding of hydro power from interstate commerce to aggrandize local fisheries is functionally indistinguishable from the withholding of hydro power to aggrandize local consumers—a practice vigorously condemned by this Court in *New England Power Co. v. New Hampshire*.[52]

As Congress made clear in 1920, in 1935 and again in 1986 (through passage of the Electric Consumers Protection Act of 1986),[53] the regulation of federally licensed hydroelectric development and operation is a national concern that should and must remain in federal hands.

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[51] FERC's specific obligation is to give "equal consideration" to environmental, power production and all other public interest values. 100 Stat. 1243, 16 U.S.C.A. 797(e).

[52] 455 U.S. 331, 334 (1982).

[53] P.L. 99-495, 100 Stat. 1243; *see especially* 16 U.S.C.A. 797(e), 803(a).

CONCLUSION

California seeks in this case to bring down one of the rocks on which this country's hydroelectric development is founded—this Court's decision in *First Iowa*. But *First Iowa*, repeatedly reinforced by Congress and the Courts, is not ready to fall. The Federal Power Act's underlying premise that federal authority must serve as the final balance point for decisions relating to the sound development of federally licensed hydroelectric resources has stood the test of time.

For the reasons stated herein, the decision of the United States Court of Appeals for the Ninth Circuit, following *First Iowa* and rejecting California's claim to jurisdiction, should be affirmed.

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